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136 U.S. 629

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 188~~6~~8

No. 926. ~~579~~ ~~294~~ 38

THE BALTIMORE AND OHIO RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

WILLIAM SUTHERLAND.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF OHIO.

FILED JUNE 23, 1886.

SUPREME COURT OF THE UNITED STATES.

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1 The United States of America to William Sutherland, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Ohio, western division, wherein The Baltimore and Ohio Railroad Company is plaintiff in error and you are defendant in error, to whow cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Martin Welker, one of the judges of said circuit court of the United States, this eighth day of December, in the year of our Lord one thousand eight hundred and eighty-five.

M. WELKER, [SEAL.]
Dist. Judge U. S., N. D. O.

1½ Acceptance of service of the within citation is hereby acknowledged this 28th day of December, A. D. 1885.

DOYLE & SCOTT,
Attorney- for Plaintiff Below.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Ohio, western division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between The Baltimore and Ohio Railroad Company, plaintiff in error, and William Sutherland, defendant, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 8th day of December, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal of the Circuit Court, Northern Dist. of Ohio.]

AUGUSTUS J. RICKS,
Clerk of the Circuit Court of the United States for the Northern District of Ohio.

Allowed by—
M. WELKER,
Acting Circuit Judge, 3d District.

2½ [Endorsed:] No. 337. William Sutherland *vs.* Baltimore & Ohio R. R. Co. Writ of error.

3 *Return on Writ of Error.*

UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division:

I, Augustus J. Ricks, clerk of the circuit court of the United States within and for said district, do hereby certify that in obedience to the command of the within writ of error the court has duly searched the record and proceedings of the said court in the cause aforesaid, and now herewith transmit to the Supreme Court of the United States a full and complete transcript thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said circuit court at office, in the city of Toledo, this 26th day of April, A. D. 1886.

AUGUSTUS J. RICKS, *Clerk.*

4 Be it remembered that heretofore, to wit, on the 22nd day of November, A. D. 1882, there was filed in the clerk's office of said court the following transcript from the court of common pleas for Huron county, which transcript is in the words and figures following, viz:

Transcript from Court Common Pleas of Huron Co.

WILLIAM SUTHERLAND
vs.
THE BALTIMORE AND OHIO RAILROAD CO.

Pleas before the Hon. C. P. Wickham, one of the judges of the court of common pleas within and for the county of Huron and State of Ohio, at the November term thereof, begun and held in the court-house at Norwalk, in said county, on the 13th day of November, A. D. 1882.

Be it remembered that heretofore, to wit, on the 12th day of August, A. D. 1882, William Sutherland, plaintiff, filed in the office of the clerk of said court his certain petition against the Baltimore and Ohio Railroad Company, defendant, and which said petition is as follows, to wit:

Petition.

Court of Common Pleas, Huron County, Ohio.

WILLIAM SUTHERLAND, Plaintiff,
against
THE BALTIMORE AND OHIO RAILROAD, COMPANY, Defendant.

The plaintiff, William Sutherland, for a cause of action against the defendant, says: That the defendant, the Baltimore and Ohio Railroad Company, was and is an incorporated company, and at the time of doing the wrongs hereinafter complained of had and owned a line of railroad running into and across the State of Ohio and through the county of Huron, and having and using thereon
as a common carrier cars, locomotive engines, and other and
5 usual equipments, machinery and appurtenances to said busi-
ness appertaining. The plaintiff avers that on or about the 31st day of January, A. D. 1882, and for some time prior thereto, he was and had been in the employ of said defendant as a common laborer at its coal yard in the village of Chicago Junction, Huron county, Ohio, and by said defendant's orders placed under the immediate and personal charge and direction of one Edward Lewis, a locomotive engineer of the defendant, known as the "hostler," and while in the performance of his duty to said defendant, in his said employment, and while strictly obeying the orders and directions of said engineer or "hostler," said engineer so carelessly, negligently, and recklessly ran, moved, and managed one of the locomotive engines of said defendant that it was then and there run upon and against this plaintiff, breaking and crushing the bones of his leg, lacerating and tearing the flesh between the knee and ankle joints, causing him great pain and suffering, and whereby amputation of plaintiff's leg became and was necessary, and which was done accordingly, by all which his life was for a long time in great peril, and whereby he became, and for a long time was, dangerously sick and a great sufferer, and put to great expense in trying to be healed of his said injury, and is now and during life will be a great and constant sufferer, and to a great extent helpless. Plaintiff says that, by reason of the injuries aforesaid, he is rendered a cripple for life, and is and will be so long as he may live unable to follow his usual trade or employment, that of a stone and brick layer and plasterer, or any other useful employment whereby he may earn a
livelihood for himself and family, and all which was wholly
6 without the fault of this plaintiff, and all to his damage in
the sum of twenty thousand dollars.

Wherefore plaintiff prays judgment against said defendant in the said sum of twenty thousand dollars and interest thereon from the 31st day of January, A. D. 1882.

WARREN SEVERANCE AND G. R. WALKER,
Attorneys for Plaintiff.

THE STATE OF OHIO, }
Huron County, } *ss:*

William Sutherland, the plaintiff, being duly sworn, says that the several matters stated and alleged in the foregoing petition are true in substance and in fact as he believes.

WILILIAM SUTHERLAND.

Subscribed in my presence and sworn to before me this 8th day of August, A. D. 1882.

SAMUEL SNYDER,
Justice of the Peace.

WILLIAM SUTHERLAND, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

Clerk of the court of common pleas:

Issue summons for the defendart to sheriff of Huron county, Ohio, returnable according to law. Plaintiff demands judgment for money only as damages. Amount claimed, twenty thousand dollars and interest from January 31, 1882.

W. SEVERANCE AND G. R. WALKER,
Attorneys for Plaintiff.

Whereupon, on precipe of plaintiff, the following summons was isssued, to wit:

Summons.

THE STATE OF OHIO, }
Huron County, } *ss:*

To the sheriff of the county of Huron, Greeting:

You are commanded to notify The Baltimore and Ohio Railroad Company that it has been sued by William Sutherland in the court of common pleas of Huron county, and that unless it answer by the 16th day of September, A. D. 1882, the petition of said plaintiff against it filed in the clerk's office of said court, such petition will be taken as true, and judgment rendered accordingly.

You will make due return of this summons on the 28th day of August, A. D. 1882.

Witness my hand and the seal of the said court this 14th
7 day of August, A. D. 1882.

S. T. A. VAN SCIVER,
Clerk of the Court of C. P., Huron County,
By JAMES BROWN, *Deputy.* [SEAL.]

Which said summons was indorsed as follows, to wit:

Indorsed: For money only as damages. Amount claimed, $20,000.00 and interest, as follows: On $20,000.00 from January 31st, 1882. Warren Severance and G. R. Walker, plaintiff's attorneys.

Which said summons was on the 25th day of August, A. D. 1882, duly returned, endorsed as follows, to wit:

Returned.

THE STATE OF OHIO, } ss:
Huron County, }

Received this writ August 14th, A. D. 1882, at 8 o'clock a m., and pursuant to its command I summoned the within-named defendant, to wit, The Baltimore and Ohio Railroad Company, by delivering to C. W. Smith, ticket agent of said company, at Monroeville, Ohio, a true and certified copy of this writ, with the endorsement thereon, he being the highest officer of said corporation found in my bailiwick, this 24th day of August, A. D. 1882.

EUGENE SMITH, *Sheriff.*

Thereupon, on the 12th day of September, A. D. 1882, the defendant filed in the office of the clerk of said court the following demurrer, to wit:

Demurrer.

In the Court of Common Pleas of Huron County, Ohio.

WILLIAM SUTHERLAND, Plaintiff,
against
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

Now comes the defendant and demurs to the petition of the plaintiff, and for cause thereof says the same does not state facts sufficient to constitute a cause of action.

NEWBEGIN AND KINGSBERRY,
Att'ys for Defendant.

Thereupon, on the 7th day of November, A. D. 1882, the defendant filed in the office of the clerk of said court the following petition for removal to the circuit court, and which said petition is as follows, to wit:

Petition for Removal.

In the Court of Common Pleas of Huron County, State of Ohio.

WILLIAM SUTHERLAND, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

Petition for removal to the circuit court of the United States
8 for the northern district of Ohio, western division.

Your petitioner, The Baltimore and Ohio Railroad Company, respectfully represents that the matter in dispute in this cause exceeds, exclusive of costs, the sum or value of five hundred dollars, and that this petition is filed at or before the term at which said cause could be first tried and before the trial thereof, and that there is a controversy in said cause between citizens of different States;

that this action is a suit of a civil nature between the said William Sutherland, the plaintiff, and a citizen of the State of Ohio, and The Baltimore and Ohio Railroad Company, the defendant, a corporation duly incorporated under the laws of the State of Maryland, and a citizen of said last-named State.

Your petitioner has made and herewith files a bond, with good and sufficient surety, for its entering in the said circuit court for the northern district of Ohio, western division, aforesaid, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by the said circuit court if said court shall hold that this suit shall have been wrongfully or improperly removed thereto; and it prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond and to cause the record herein to be removed into said circuit court of the United States in and for the northern district of Ohio, western division; and it will ever pray.

THE BALTIMORE AND OHIO
RAILROAD COMPANY,
By NEWBEGIN AND KINGSBURY,
Its Attorneys.

STATE OF OHIO, *County of Defiance*:

Henry Newbegin, being duly sworn, says that he is attorney of the Baltimore and Ohio Railroad Company, and that the statements and allegations contained in the foregoing petition are true, to the best of his knowledge, information, and belief.

9 HENRY NEWBEGIN.

Subscribed and sworn to before me, a notary public, this 30th day of October, 1882.

S. T. SUTPHEN,
Notary Public.

Know all men by these presents that we, The Baltimore and Ohio Railroad Company, as principal, and Henry Newbegin and Lewis D. Sturtton, as sureties, are held and firmly bound unto William Sutherland, of Huron county, State of Ohio, in the penal sum of five hundred dollars, the payment whereof well and truly to be made unto the said William Sutherland, his representatives and assigns, we bind ourselves, our heirs, representatives, successors, and assigns, jointly and severally, firmly by these presents.

Whereas the Baltimore and Ohio Railroad Company has filed its petition in the court of common pleas of Huron county, State of Ohio, asking for the removal to the circuit court of the United States in and for the northern district of Ohio of a certain cause wherein said William Sutherland is plaintiff and The Baltimore and Ohio Railroad Company is defendant:

Now, the condition of the above obligation is such that if the said Baltimore and Ohio Railroad Company shall enter in the said circuit court of the United States for the district aforesaid, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

Witness the corporate name of the said Baltimore and Ohio Railroad Company, by Samuel Spencer, its third vice-president, and its corporate seal and the names and seals of said sureties, on the 31st day of October, 1882.

THE BALTIMORE AND OHIO
RAILROAD COMPANY,
By S. SPENCER, [SEAL.]
Third Vice-President.
HENRY NEWBEGIN. [SEAL.]
LOUIS D. STRUTTON. [SEAL.]
Test: W. H. IJAMS, *Treas.*

THE STATE OF OHIO, } ss:
Defiance County, }

Henry Newbegin, one of the sureties aforesaid, being sworn, says that he is the identical person whose name is affixed to said bond; that he has real estate subject to execution at law and exceeding all his liabilities and exemptions, situate in the said northern district of Ohio, exceeding in value the sum of five thousand dollars.

HENRY NEWBEGIN.

Sworn to and subscribed in my presence this 31st day of October, 1882.

S. T. SUTPHEN,
Notary Public.

Journal Entry.

Thereupon at the November term A. D. 1882, of said court, to wit on the 13th day of November, 1882:

This day came the parties and this cause was submitted to the court on the petition of the said defendant to remove this action to the circuit court of the United States for the northern district of Ohio, western division.

And the court finding that the plaintiff herein is a citizen of the State of Ohio and the said defendant is a citizen of the State of Maryland, and that this *is* controversy herein [is] between citizens of different States, and, further, that the matter in dispute herein exceeds, exclusive of the costs, the sum of five hundred dollars, and that the defendant has filed herein its petition with bond as required by law for the removal of this action to the said circuit court of the United States, which petition and bond were filed before the present term of this court, this being the term at which said action could first be tried and before the trial thereof:

It is therefore ordered that the said petition and bond be, and the same are hereby, accepted, and the clerk of this court is ordered, on request of the defendant, to make a certified copy of the record of this cause for filing in the said circuit court of the United States; to which ruling and order of the court the plaintiff, by his counsel, excepts.

11 THE STATE OF OHIO, }
Huron County, } *ss:*

I, S. T. A. Van Sciver, clerk of the court of common pleas within and for said county, having the custody of the files, journals, and records of said court, hereby certify that the foregoing copy is taken and copied from the records of proceedings of the court of common pleas within and for said Huron county, and that said foregoing copy has been compared by me with the original record, and that the same is a full and correct transcript thereof.

Witness my hand and the seal of said court at Norwalk this 15th day of November, A. D. 1882.

[SEAL.] S. T. A. VAN SCIVER, *Clerk.*

I, C. P. Wickham, one of the judges of the court of common pleas within and for the 4th judicial district of the State of Ohio, do hereby certify that said S. T. A. Van Sciver was at the date of the above certificate and now is clerk of said court of common pleas within and for said county of Huron and State of Ohio, and that said clerk is the officer in whose custody said original record is required to be kept by the laws of the State of Ohio, and authorized by the laws of said State to certify as aforesaid, and that said attestation to said copy of said record is in due form of law.

Signed by me and dated at Norwalk, Huron county, Ohio, this 15th day of November, A. D. 1882.

C. P. WICKHAM,
Judge as aforesaid.

THE STATE OF OHIO, }
Huron County, } *ss:*

I, S. T. A. Van Sciver, clerk of the court of common pleas within and for the county and State aforesaid, hereby certify that C. P. Wickham is one of the judges of the court of common pleas within and for the 4th judicial district of the State of Ohio, duly commissioned and qualified, and now acting as such.

12 Witness my hand and the seal of said court at Norwalk this 15th day of November, A. D. 1882.

[SEAL.] S. T. A. VAN SCIVER, *Clerk.*

(Endorsed:) I hereby acknowledge myself security for all costs for which the defendant may be liable in this suit. Henry Newbegin.

And afterwards, to wit, on the 5th day of December, A. D. 1882, the following order was entered in this cause in said court, viz:

Leave to Amend Petition.

WILLIAM SUTHERLAND *vs.* THE BALTIMORE AND OHIO R. R. Co.

In this cause it is ordered that the plaintiff have leave to amend his petition within sixty days and that defendant have thirty days thereafter to answer.

And afterwards, to wit, on the 3rd day of February, A. D. 1883, the following amended petition was filed in this cause in said court, viz:

Amended Petition.

Court of Common Pleas, Huron County, Ohio, and transferred to the Dist. Court of the U. S. on motion of defendant.

WILLIAM SUTHERLAND, Plaintiff,
vs.
THE BALTIMORE & OHIO R. R. Co., Defendant.

Now comes the plaintiff, William Sutherland, and by leave of the court files this his amended petition herein and says:

The defendant, The Baltimore and Ohio Railroad Company, at the time of committing the wrongs hereinafter complained of, was and still is an incorporated company, and owned and operated a line of railroad running into and across the State of Ohio, and through the county of Huron in said State, and having and
13 using thereon as a common carrier cars, locomotive engines,
and other and usual equipments, machinery, and appurtenances to said business appertaining.

The plaintiff avers and alleges that on or about the 31st day of January, 1882, and for some time prior thereto, he was and had been in the employ of said defendant as a common laborer at its coal yard in the village of Chicago Junction, Huron county, Ohio, and by said defendant's orders was placed under the immediate and personal charge and direction of one Edward Lewis, a locomotive engineer of the defendant, known as the "hostler," and while in the performance of his duty as such laborer to said defendant, and while strictly obeying the orders and directions of said engineer in that behalf, said engineer being then in the employ of said defendant and on duty as such engineer, so carelessly, negligently, and recklessly ran, moved, and managed one of the locomotive engines of said defendant, that it was then and there, without fault on the part of the plaintiff, run upon and against this plaintiff, breaking and crushing the bones of his right leg, lacerating and tearing the flesh between the knee and ankle joints, causing him great pain and suffering, and whereby amputation of plaintiff's leg became necessary, and which was done accordingly, by all which his life was greatly endangered (and was for a long time despaired of), and whereby he became and for a long time was dangerously sick (and a great sufferer), and put to great expense in trying to be cured of his said injuries), and whereby he is now, and during his life-time will continue to be, a great and constant sufferer, and to a great extent helpless.

14 Plaintiff says that by reason of the injuries aforesaid he is rendered a cripple for life, and is, and so long as he may live will be, unable to follow (his usual trade or employment, that of a stone and brick layer and plasterer or) any other useful employment whereby he may earn a livelihood for himself and family, all which was wholly without the fault of this plaintiff and to his damage in the sum of twenty thousand dollars.

Whereby plaintiff prays judgment against said defendant in the said sum of twenty thousand dollars and interest thereon from the 31st day of January, 1882.

WARREN SEVERANCE AND
G. R. WALKER,
Atty's for Plaintiff.

THE STATE OF OHIO, } ss:
Huron County, }

William Sutherland, the plaintiff, being duly sworn, says that the several matters stated and alleged in the foregoing amended petition are true in substance and in fact as he believes.

WILLIAM SUTHERLAND.

Subscribed in my presence and sworn to before me this 2nd day of February, A. D. 1883.

SAMUEL SNYDER,
Justice of the Peace.

And afterwards, to wit, on the 22nd day of February, A. D. 1883, the following motion was filed in this cause in said court, viz:

Motion to Make Amended Petition More Certain and Definite.

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

WILLIAM SUTHERLAND, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

Motion to make amended petition certain and definite.

15 Now comes the defendant, the said Baltimore and Ohio Railroad Company and moves the court that the said plaintiff be required to make his amended petition definite and certain in this—

First. That he set out by what authority the said defendant is an incorporated company.

Second. That, as this defendant is a corporation and can act only through its agents, the plaintiff set out by what agent's orders (specifically naming him) the plaintiff "was placed under the immediate and personal charge and direction of one Edward Lewis, a locomotive engineer of the defendant," and that he further states what were the said agent's authority and powers in the premises, that this defendant may be enabled to plead thereto.

NEWBEGIN AND KINGSBERRY,
Defendant's Attorneys.

And afterwards, to wit, on the 23rd day of June, A. D. 1883, the following proceedings were had in this cause in said court, viz:

Motion Overruled, &c.

WILLIAM SUTHERLAND *vs.* THE BALTIMORE & OHIO R. R. Co

Motion overruled.

This cause came on to be heard upon the motion of the defendant to make amended petition more definite, and the court being fully advised in the premises overrules the same, to which the defendant, by its attorneys, excepts, and it is further ordered that the defendant answer herein in sixty days, and this cause is contined to the next term of this court.

16 And afterwards, to wit, on the 31st day of July, A. D. 1883, the following demurrer was filed in this cause in said court, viz:

Demurrer to Amended Petition.

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

WILLIAM SUTHERLAND
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

Now comes the said defendant, by Newbegin and Kingsberry, its attorneys, and demurrers to the amended petition of the said plaintiff, herein filed, for that the facts as therein alleged do not in law constitute a cause of action against this defendant.

NEWBEGIN AND KINGSBERRY,
Attorneys for Defendant.

And afterwards, to wit, on the 7th day of January, A. D. 1884, the following proceedings were had in this cause in said court, viz:

Demurrer Overruled.

WILLIAM SUTHERLAND *vs.* THE BALTIMORE & OHIO R. R. Co.

This cause came on to be heard upon the demurrer to the amended petition, and the court being fully advised in the premises overrules the same, to which the defendant, by its attorneys, excepts, and it is further ordered that the defendant answer herein in thirty days, and this cause is continued to the next term of this court.

17 And afterwards, to wit, on the 16th day of January, A. D. 1884, the following motion was filed in this cause in said court, viz:

Motion to Strike Out Irrelevant Matter from Amended Petition.

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

William Sutherland, Plaintiff,
vs.
The Baltimore & Ohio R. R. Company, Defendant.

Motion to strike out irrelevant matter.

Said defendant now here moves the court to require the plaintiff to strike out of his amended petition herein filed, as irrelevant and misleading, the following words in the fourth line of the third page of the said petition, to wit: "and was for a long time d*is*paired of;" and the following words, commencing with the last word on the sixth line of said page: "and a great sufferer;" also, all of the remainder, after the said word "sufferer," of the first paragraph of said page, except the words "and whereby he is now, and during his life time will continue to be, to a great extent helpless;" also, the following words in the second paragraph of said third page, to wit: "his usual trade or employment, that of a stone and brick layer and plasterer."

NEWBEGIN and KINGSBERRY,
Attorneys for said Defendant.

And afterwards, to wit, on the 13th day of June, A. D. 1884, the following proceedings were had in this cause in said court, viz:

Part of Motion to Strike Out, &c., Sustained.

William Sutherland
vs.
The Baltimore & Ohio R. R. Company.

18 This cause came on to be heard upon the motion to strike out irrelevant matter from amended petition, and was argued by counsel, and thereupon it is ordered by the court that the part of said motion to strike out "and was for a long time despaired of" be sustained, and that the rest of said motion be overruled, and defendant has leave to file his answer in sixty days, and this cause is continued to the next term of this court.

And afterwards, to wit, on the 19th day of June, A. D. 1884, the following answer was filed in this cause in said court, viz:

Answer to Amended Petition.

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

William Sutherland, Plaintiff,
vs.
The Baltimore and Ohio Railroad Company, Defendant.

Now comes the said defendant and, answering the last amended petition of the said plaintiff against it herein filed—

First. It denies all and singular the allegations set forth in said petition after the first paragraph thereof, ending with the words "to said business appertaining."

Second. The defendant, further answering, says that the injury of which the plaintiff complains in his petition happened to him while in the service of this defendant, engaged in a service which he was specially employed to do by the defendant, and the dangers attending which he well knew at the time he entered upon his said employment and the risk of which he took upon himself; that it is
19 not true that the said Edward Lewis was a superior servant
of this defendant to the said plaintiff, but, on the contrary, was a fellow-servant with him, engaged in a common service with him at the time of his said injury, and that the said injury was the direct result of the carelessness and negligence of the plaintiff in the service of the defendant under his said employment and of the carelessness and negligence of his said fellow-servant engaged with him in the said common service of the defendant and incident to the employment in which he was engaged, the risk of all which the said plaintiff took upon himself, as he well knew at the time he entered the service of the defendant, and the said injury happened to the plaintiff wholly without the fault or negligence of this defendant.

Third. The said defendant, further answering, says that the plaintiff ought not to maintain his action against it, for that prior to the time that the said plaintiff entered the service of this defendant and before he sustained the injuries by him complained of in his petition this defendant had instituted a certain organization known as the "Baltimore and Ohio Employees' Relief Association," with the special object, as stated in its constitution, of providing for those who should become its members while disabled by accident, sickness, or old age, and at their deaths for their families, and that membership in the said association was confined to the employees of the defendant.

That the said defendant contributed very largely to the funds of said association, to wit, the sum of one hundred thousand dollars, bore all the expenses necessary for the proper management of its affairs, amounting annually to the further sum of twenty-five thou-
20 sand dollars, and had, through its officers and agents, such as
were chosen by the members themselves of the association, the general supervision, management, and control of the said association, and, further, in consideration of the consent of all who

should become members of the said association to be bound by its constitution, rules, and regulations, this defendant guarantied to the members thereof and to each of them all the benefits offered by the said association and contemplated in its organization.

These benefits were to those members (of which *were* the plaintiff) who contributed the smallest sum monthly toward its benefit, and all necessary surgical attendance free when injured by accident while in discharge of their duty in the service of the defendant, the sum of fifty cents per day to be paid during the first six months of their disability and one-half thereof thereafter during the time they were disabled by such injury, and in event of their death within six months from their injury the sum of five hundred dollars to their families.

And the defendant says that it was a condition of the employment of the plaintiff by it, at the time he entered the said service of the defendant, that he should become a member of the said relief association and be bound by its rules and regulations and contribute to its benefit fund each month a certain portion of his wages for his said service, and especially in the event of injury while in the said service that he should look to the benefit fund provided for its members and to the said guaranty of the defendant as the sole compensation for his injuries, and that this defendant should be otherwise discharged and held free from all liability therefor; all of which conditions and stipulations the plaintiff agreed to at the time he en-
tered the said service of the defendant, and did contribute
21 of his wages for the benefit fund of said association while he
was in the service of said defendant the sum of 75 cts.
monthly; that prior to the time of his said injury, to wit, on the 8th day of February, 1881, the plaintiff applied to be admitted and was admitted a member of the said association in consideration of the payment by him of the sum of 75 cts. monthly to its benefit fund while in the service of the defendant and of being bound by its rules and regulations, made known to him at the time of his said application, which he agreed to do, and that he did during the time from his said admission to his said injury pay to the said benefit fund the sum of seventy-five cents monthly from his said wages; and that among the rules so made known to him at the time of his said application was one to the effect that the receipt of the benefits of said association by him in case of injury while in the defendant's service should be held and admitted to be a release and discharge of this defendant from any liability therefor; that at the time of his said injury the said plaintiff was a member of the said association, bound by all its rules and regulations, and entitled to all its benefits; that he was provided by the said association, free of any expense to him, at the time of his said injury, and since, as long, as the same was by his said injury required, with all necessary surgical attention and treatment, and he accepted the same well knowing that it was being furnished him by said association, as a member thereof, without remonstrance or objection, and that if he has not received the other benefits of the payment of the said sum of money while he was disabled from work on account of his said injury it has been

for the reason that he has not applied therefor under the rules of the association.

22 And this defendant says that by reason of the conditions as aforesaid under which he entered the service of the defendant, and of his becoming a member of the said association and being entitled to and receiving its benefits, the said plaintiff is estopped from setting up any claim whatever against the defendant for damages on account of his said injury, and likewise estopped from prosecuting this action therefor.

HENRY NEWBEGIN,
B. B. KINGSBURY,
Attorneys for Defendant.

THE STATE OF OHIO, } ss:
Defiance County, }

Henry Newbegin, attorney for the said defendant, being sworn, says that he believes the matters alleged in the foregoing answer are true.

HENRY NEWBEGIN.

Sworn to before me, and in my presence subscribed, this 17th day of June, A. D. 1884.

[SEAL.] N. G. JOHNSTON,
Notary Public.

And afterwards, to wit, on the 25th day of September, A. D. 1884, the following reply was filed in this cause in said court, viz:

Reply.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

WILLIAM SUTHERLAND, Pl'ff,
vs.
THE BALTIMORE AND OHIO R. R. Co., Def't.

Reply of plaintiff.

Now comes the said plaintiff, and, for his reply to the third defense in said answer stated, says:

23 1st. That it is not true and he denies that at the time of his said injury he was a member of said alleged insurance association, or in any manner bound by its rules and regulations.

2nd. This plaintiff further denies that at the time he was suffering from said injuries he knew or believed, or had any reason to believe, that he was being attended by surgeons employed therefor by said alleged insurance association, or that such surgeons were so employed, as alleged in said answer.

3rd. This plaintiff further says that he has no sufficient knowledge or means of information of the organization, existence, or objects of said alleged insurance association to form a judgment or opinion thereof, and he therefore denies each and all allegations of said answer regarding the same and of this plaintiff's connection therewith, and further denies that he ever received therefrom any of said alleged benefits.

4th. This *defendant* further says that it is not true and he denies that said alleged insurance does or could in any respect operate as an estoppel of his right to recover in this action his damages as alleged in his petition herein.

WARREN SEVERANCE,
G. R. WALKER, AND
JOHN H. DOYLE,
Plaintiff's Attorneys.

THE STATE OF OHIO, } *ss:*
Huron County, }

Wm. Sutherland, the plaintiff, being duly sworn, says that the statements and allegations of the foregoing reply are true in substance and in fact, as he believes.

WILLIAM SUTHERLAND.

Subscribed in my presence and sworn to before me this 15th day of Sept., 1884.

E. A. PRAY, [SEAL.]
Notary Public.

24 And afterwards, to wit, on the 17th day of October, A. D. 1884, the following order was filed in this cause in said court, viz:

Leave to Refile Reply.

WILLIAM SUTHERLAND, Pl'ff,
vs.
THE BALTIMORE & OHIO R. R. Co., Def't.

By consent plaintiff has leave to reply, and having filed his reply out of rule the same may be considered as refiled by leave this day.

And afterwards, to wit, on the 17th day of October, A. D. 1884, the following reply was refiled in this cause in said court:

Reply of Plaintiff.

In the Circuit Court of the U. S. for the Northern Dist. of Ohio, Western Division.

WILLIAM SUTHERLAND, Plaintiff,
vs.
THE BALTIMORE & OHIO R. R. Co., Def't.

Now comes the said plaintiff, and, for his reply to the third defense in said answer stated, says:

First. That it is not true and he denies that at the time of his said injury he was a member of said alleged insurance association, or in any manner bound by its rules and regulations.

Second. This plaintiff further denies that at the time he was suffering from said injuries he knew or believed, or had any reason to believe, that he was being attended by surgeons employed therefor by said alleged insurance association, or that such surgeons were so employed, as alleged, in said answer.

Third. The plaintiff further says that he has no sufficient knowledge or means of information of the organization, existence, or objects of said alleged insurance association to form a judgment or opinion thereof, and he therefore denies each and all allegations of said answer regarding the same and of this plaintiff's 25 connection therewith, and further denies that he ever received therefrom any of said alleged benefits.

Fourth. This *defendant* further says that it is not true and he denies that said alleged insurance does or could in any respect operate as an estoppel of his right to recover in this action his damages as alleged in his petition herein.

WARREN SEVERANCE,
G. R. WALKER, AND
JOHN H. DOYLE,
Plaintiff's Attorneys.

THE STATE OF OHIO, } *ss:*
Huron County, }

Wm. Sutherland, the plaintiff, being duly sworn, says that the statements and allegations in the foregoing reply are true in substance and in fact, as he believes.

WM. SUTHERLAND.

Subscribed in my presence and sworn to before me this 15th day of September, 1884.

[SEAL.]

E. A. PRAY,
Notary Public.

And afterwards, to wit, on the 10th day of December, A. D. 1884, and on each of the days following, being days of the December term, A. D. 1884, of said court, the following proceedings were had in this cause in said court, viz:

Trial of Case. Jury Sworn.

WILLIAM SUTHERLAND, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

This day came the parties, by their counsel, and came also a jury, to wit, Timothy Hayes, William Wickham, Samuel Skinner, 26 Sanford Baldwin, Sanford D. Baker, William Moneysmith, Reason W. Kelley, Caleb Bevier, Charles S. Herrick, Samuel Collins, George Roberts, and William Foster, who, being accepted, were empanelled ans sworn well and truly to try the issues joined between the parties, and thereupon the further trial of this case was postponed until to-morrow morning.

DECEMBER 11TH, 1884.

This day came again the parties, by their counsel, and Caleb Bevier, one of the jurors empanelled and sworn yesterday in this case, failing to appear on account of serious illness, and it appearing to the satisfaction of the court that it would be impracticable to delay business in the court until the recovery of said juror, and the defendant, by its counsel, refusing to consent to proceed with the trial with the remaining eleven of said jurors so empaneled and sworn, it is therefore ordered that said jury be discharged from any further consideration of this case; to which action and order the defendant then and there objected, which objections were overruled, and defendant excepted, and thereupon, the plaintiff being ready and demanding a trial, an other jury was called, to wit: Timothy Hayes, Wm. Wickham, Samuel Skinner, Sanford Baldwin, Sanford D. Baker, Wm. Moneysmith, Reason W. Kelley, Charles S. Herrick, Samuel Collins, George Roberts, William Foster, and Oliver Lee, who, being duly elected and empaneled, were sworn according to law; to which action and order of the court the defendant then and there objected, and said objections were overruled, and to which defendant took his exceptions, and thereupon the trial of this case
proceeded. Testimony was offered by the plaintiff, but, not
27 having been concluded when the hour of adjournment arrived, the further proceedings in this case were postponed until to-morrow morning.

DECEMBER 12TH, 1884.

This day came again the parties, by their counsel, and came also the jury as hereinbefore empanelled and sworn herein, and the trial of this cause proceeded. Testimony was offered and closed on the part of both plaintiff and defendant. Testimony in rebuttal was offered and closed on part of the plaintiff. Arguments of counsel were submitted, but not concluded; whereupon the further trial of this cause was postponed until to-morrow morning.

DECEMBER 13TH, 1884.

This day came again the parties, by their counsel, and came also the jury as hereinbefore empanelled and sworn herein, and the trial of this cause proceeded. Arguments of counsel were submitted, but not concluded; whereupon the further trial of this cause was postponed until to-morrow morning.

DECEMBER 14TH, 1884.

This day came again the parties, by their counsel, and came also the jury as hereinbefore empanelled and sworn herein, and the trial of this cause proceeded. Arguments of counsel were submitted, but not concluded; whereupon the further trial of this cause was postponed until to-morrow morning.

DECEMBER 16TH, 1884.

This day came again the parties, by their counsel, and came also the jury as hereinbefore empanelled and sworn herein, and the trial of this cause proceeded. Arguments of counsel were submitted and concluded, and the jury having received their instructions from the court retired in charge of the marshal for deliberation, and after a time came again into court and for their verdict say: 28

Verdict.

"We, the jury in this case, being duly empanelled and sworn, do find for the plaintiff, and assess his damaged at the sum of eight thousand five hundred dollars ($8,500.)

"GEORGE W. ROBERTS, *Foreman.*"

And afterwards, to wit, on the 19th day of December, A. D. 1884, the following motion was filed in this cause in said court, viz:

Motion for a New Trial.

In the Circuit Court of United States, Northern District of Ohio,
Western Division. December Term, 1884.

William Sutherland
vs.
The Baltimore and Ohio Railroad Company.
No. 337.

Now comes the said defendant, by its attorneys, and moves the court to set aside the verdict of the jury returned herein at the present term, and to grant a new trial of this cause, for the follow[ing] reasons, to wit:

There was error of law in the orders and rulings of the court made during the trial of this cause, to the prejudice of the defendant, in this—

1st. The court discharged the jury first empanelled and sworn herein without legal cause and against the objection of the defendant, and to which the defendant at the time excepted.

2nd. The court empanelled forthwith another jury to try this cause, and ordered them sworn, ten of which jury had previously been sworn for the trial of this same cause, and without any statements of the cause of action made—them, and without inquiry as to whether they had formed or expressed an opinion on the merits of the case, or were otherwise prejudiced for or against either of the parties, to which empanelling of said jury the defendant objected at the time and took its exception. 29

3rd. That in the empanelling of the said last-named jury the court ordered the clerk to call the regular jurors subpœnaed for the present term of this court, of whom were two, to wit: O. W. Hopkins and Robert Stewart, who were called by the clerk under said order, and whom, on the empanelling of the first jury aforesaid, the defendant had peremptorily challenged, and the defendant was now at the empanelling of the second jury aforesaid obliged to challenge peremptorily said two named jurors, and thereby to his prejudice was deprived of two of his peremptory challenges allowed him by the law.

4th. The court erred, to the prejudice of the defendant, in admitting testimony to be given in evidence to the jury by the plaintiff on the trial of this cause over the objection of the defendant, and to which the defendant excepted at the time.

5th. The court erred in excluding testimony offered to be given in evidence by the defendant on the trial of this suit, to which the defendant excepted at the time.

6th. The court erred in its instructions given to the jury on the trial of this cause, to which the defendant specifically excepted at the time.

7th. The court erred in its refusal to give certain instructions to the jury on the trial of this cause, requested by the defendant, and to which refusal the defendant at the time excepted.

8th. The verdict of the jury is against the weight of the evidence given to the jury on the trial of this cause.

30 9th. The verdict of the jury is not sustained by sufficient evidence so given on the trial.

10th. The verdict of the jury is contrary to the law of the land.

C. H. SCRIBNER,
HENRY NEWBEGIN,
Att'ys for Defendant.

And afterwards, to wit, on the 3rd day of March, A. D. 1885, the following order was entered in this cause in said court, viz:

Order Allowing Bill of Exceptions.

William Sutherland
vs.
The Baltimore and Ohio Railroad Company.
No. 337.

This day came the parties, by their counsel, and thereupon the defendant tendered its bill of exceptions to the rulings and action of the court in this case at the present term of this court, and ordered that the same be signed, sealed, and filed, and ordered to be made a part of the record of this case, which is accordingly done.

31 And afterwards, to wit, on the 3rd day of March, A. D. 1885, the following bill of exceptions was filed in this cause in said court, viz:

In the Circuit Court of the United States, Northern District of Ohio, Western Division. December Term, 1884.

William Sutherland
vs.
The Baltimore and Ohio Railroad Company.
No. 337.

Be it remembered that at the said term of this court this cause came on for trial on the 10th day of December, A. D. 1884, being the eighth judicial day of said term, and thereupon a jury was duly

empanelled and sworn, to wit, Timothy Hayes, William Wickham, Samuel Skinner, Sanford Baldwin, Sanford D. Baker, William Moneysmith, Reason W. Kelley, Caleb Bevier, Charles S. Herrick, Samuel Collins, George Roberts, and William Foster, and without further proceedings in the cause the court adjourned to the next day. On the convening of the court the next day, being the ninth judicial day of said term, upon the jury being called by the clerk, one of the jurors aforesaid, to wit, one Caleb Bevier, was absent and did not respond; thereupon the marshal reported to the court that the wife of said Caleb Bevier had reported to him that said Caleb Bevier was taken seriously ill, and would not be able to be present for some time, and the court being satisfied, as shown upon its journal of the proceedings of said day that said juror could not be present, and
that the business of the court could not be delayed by reason
32 of the sickness of said juror, and because of such sickness asked
the counsel for both parties whether they would proceed to tais trial with the eleven remaining jurors, to which the counsel for the plaintiff responded that they would consent to so proceed; but, counsel for defendant objecting, the inquiry was made whether the parties would consent to filling the panel from another of the regular jurors present, to which counsel for the plaintiff assented, but defendant's counsel objected. Whereupon the court discharged the jury from the further consideration of the cause, to which defendant objected, and to the order of the court discharging the jury excepted. And thereupon, there being in attendance the regular jurors of the term except the said Caleb Bevier in sufficient numbers to empannel*l* a jury for the trial of said cause, and the plaintiff being ready and demanding a trial on the said day, the court ordered a jury to be called by the clerk for the trial of said cause, to which the defendant objected and excepted.

Thereupon the clerk proceeded to call the names of said jurors in the order in which the same appeared upon the jury list. Among the names so called was the said Caleb Bevier, who did not respond, and also two others, to wit, O. N. Hopkins and Robert Stewart, who did respond to the call of their names and took their seats in the panel, and which two last-named jurors, on the empannelling of the jury first-named aforesaid, the defendant by its attorney had peremptorily challenged, and now again peremptorily challenged; but no objection was made by said defendant or its attorneys to the calling of said names, or to their taking their seats in the panel, and no action of the court was asked thereon except by the peremptory challenge aforesaid. And thereupon the panel
being full and consisting of the fallowing-named jurors, to wit,
33 Timothy Hayes, William Wickham, Samuel Skinner, Sanford
Baldwin, Sanford D. Baker, William Moneysmith, Reason W. Kelley, Charles S. Herrick, Samuel Collins, George Roberts, William Foster, and Oliver Lee, and the plaintiff, by his attorneys, and the defendant, by its attorneys, having made such statement to the jury and such inquiries of the jurors as they saw fit, after the challenges aforesaid, and no further challenges being made by either party, the said jury was sworn, and thereupon the said trial proceeded.

Testimony on Behalf of Plaintiff.

In the United States Circuit Court, Northern District of Ohio, Western Division. Tried at Toledo, Ohio, in the December Term, 1884, before Hon. Martin Welker, J., and a jury.

WILLIAM SUTHERLAND
vs.
THE BALTIMORE & OHIO R. R. CO.
} No. 337. Law.

Deposition of Wm. Sutherland.

The plaintiff, to maintain the issues on his part, offered as a witness himself, WILLIAM SUTHERLAND, and, being first duly sworn, testified as follows:

Direct examination by Mr. WALKER:

Q. You are the plaintiff in this case?
A. Yes, sir.
Q. Where do you reside?
A. In Plymouth now—Huron Co., Ohio.
Q. You may tell the jury where you resided in January, 1882.
A. In Chicago Junction, Huron county.
Q. You may state if you were employed by any one representing the Baltimore and Ohio railroad about that time.
A. Yes, sir.
Q. In what capacity were you employed?
A. I was employed as tender—tending engines.
Q. Who employed you?
A. Mr. J. Gunther, master mechanic.
Q. Where does he live?
A. At Chicago Junction.
Q. I will ask you, Mr. Sutherland, at that time to state whether you were married or single.

34 (Objected to by defendant, by its counsel. Overruled; to which defendant, by its counsel, duly excepted.)

A. I was married.
Q. What is your age now?
A. I will be 34 the 1st day of January.
Q. What family did you have then in '82?

(Objected to by defendant, by its counsel.)

The COURT: He cannot recover for his children. Go on, and don't incumber the record with that.
Mr. WALKER: We will consider it out.
The COURT: If you think it is important I will let you do it with defendant's exceptions.

(Defendant, by its counsel, duly excepted.)

Q. Mr. WALKER: What family did you have then?
A. I had two children.

Q. In 1882?

A. Yes.

Q. You mentioned that you had been employed by Mr. Gunther?

A. Yes, sir.

Q. In what capacity was he?

A. He was master mechanic of the round-house.

Q. By what special designation is he known?

A. He is called the master mechanic of the shops.

Q. How long had he been engaged in that employment, to your knowledge?

A. In 1875, when I came to Chicago Junction, he was master mechanic then—no; the round-house was built in '75, and he became next summer master mechanic.

Q. State if he has been acting in the same capacity since.

A. Ever since I have been acquainted with him.

Q. What affairs are carried on under his charge there, if any, of the Baltimore and Ohio company's affairs?

A. He hires and discharges the employes that work at the round-house, and he hired me as a tender, to tend to engines, and Edward Lewis was hostler, and that I should work under him.

Q. What were the duties that Mr. Gunther performed there?

A. He is head overseer of the shops and the round-house.

35 Q. What duty had — in the employment of his hostler? Whose duty was it to employ him?

A. It was Mr. Gunther's.

Q. What were the duties of the hostler?

A. He was to take charge of the engine after it was delivered in and the engineer stepped off; Edward Lewis was to take charge of the engine and give it necessaries that it had to have—coal, &c.

Q. How was it as to this hostler being himself an engineer?

A. Mr. Gunther promotes them there.

Q. Did it require or not require a man who was an engineer himself to do that duty?

(Objected to as leading. Sustained.)

Q. Will you state now what qualifications, if any, were necessary to make a hostler?

Q. The Court: Do you know?

A. No, sir; I couldn't answer that.

Q. Mr. Walker: What were his duties?

A. To take charge of the engine and give it the necessaries that it required.

Q. What did it require him to do with the engine, if anything, in order to give it what was required?

A. He told us whatever he wanted.

Q. No; who run the engine to its proper place?

Q. The Court; What were you to do with it?

A. We was to give it coal.

Q. Mr. Walker: What did the hostler have to do, if anything, with the engine?

A. He had to give it necessaries and then deliver it into the round-house.

Q. To do that state whether or not it was necessary for him to move the engine.

A. No, sir; not at the time.

Q. Mr. Dowle: Who took the engines to the coal-bins?

A. Edward Lewis took it to the coal-bin.

Q. Mr. Walker: Whose duty was it to take it to the round-house from the coal-bin?

A. Edward Lewis.

Q. The Court: He was to feed it by giving it coal—let us understand what he was doing with the engine?

36 A. As the engine comes in off the road it requires coal and sand and fuel and water.

Q. What does the hostler have to do about that?

A. He ordered us whatever he wanted.

Q. What did he have to do in the way of moving the engine, if anything?

A. He didn't have anything to do with moving the engine at the time.

Q. Mr. Walker: When did the engineer who brought the engine in leave it, and where?

A. He left it on the side track near the coal-shutes; sometimes he would run up right beside the coal-shutes.

Q. The incoming engineer would run up there?

A. Yes; then he would step off the engine, and when he stepped off it Edward Lewis, the hostler, took charge of it.

Q. State what the hostler had to do with it, and where he would go with it.

A. If he wanted coal he told me, and we had to give it coal.

Q. You are too brief about it. Tell what was required to do in order to give it coal. I am now trying to have you trace the engine from the time the incoming engineer leaves it until that engine goes into the round-house. Will you just state what the duties were you would have to do with it. Tell the whole of it.

A. The engine was put in charge of him, and he—whatever he wanted me to do in regards to giving it coal, sand, or water I done it.

Q. Describe the whole job right through, supposing the engine wanted all of it.

A. Every engine wanted, more or less, all of it.

Q. Describe it from the time the hostler stepped aboard, got on the engine until he quits it, ready to go out.

A. This engine that I was injured on we had just got it coaled.

Q. When did the hostler get on that engine first?

A. We had just got on the engine, and he moved it to the number we was to get it coaled.

Q. The hostler did that?

A. Yes; and we had got it coaled.

37 Q. Which side of the coal-shute was that?

A. On the south side.

Q. How far along?

A. It was No. 11 pocket. It was pretty well to the east part, at that time, of the shutes.

Q. Will you describe the work of giving that engine coal?

A. We had just given that engine coal, and I was injured——

Q. No difference about that. I ask you to describe the work—the manner of doing the work.

A. We drawed the apron down, and then opened the door with the lever——

Q. The COURT: What did you bring the coal to; how did you get there?

(Witness is shown a model of a locomotive engine and also of a coal-shute.)

A. This apron had to be taken down in this manner. We took the lever from underneath it, and that lets her trap-door open to give this engine coal. This apron has got to be down in this manner. I was right on this pin. After I got the coal out of this pocket this door throws up in this manner, and I had to climb up to set this little pin to hold this when the coal is put in above here off the car. I had got up on the side of the apron.

Q. The COURT: Is that the way it is when the engine comes up?

A. Yes, sir; the apron is thrown back in its place like that, and this pocket is full of coal. Whatever amount of coal is in this we have to give that engine. When we open the pocket we can't stop it. I was ordered to give the engine coal. I had to pull this apron down and loose this lever. The heft of the coal—the pressure—throws that open—the pressure from the inside. After the engine has received the amount of coal in the pocket I get upon this pin in order to get it closed down, so that when the coal is put in [it] is put in on top again. If we don't close it there would be danger, and the coal would fly out onto the engine. I had to get up onto
this here pin here in order to close that down, and while I was
38 upon that pin, and with my back turned and the lantern on
the cab of the engine—my back to the cab——

Q. Mr. WALKER: Where was your right leg?

A. My left foot was on this pin; right leg was hanging loose. When the engine backed it could only catch one limb. While I was closing that he backed the engine and caught my right leg between this heavy apron and the top of the cab.

Q. The COURT: The engine was moved back?

A. Yes; it was moved back while I was closing that down, and my leg was caught betwixt the tender and the apron.

Q. Mr. WALKER: Tell about that apron.

A. It is middling heavy, hung generally with weights. After we give it coal and close the apron—put it up—the engine can't move, uless that apron is throwed up in its proper place.

Q. What is this apron constructed of?

A. Made out of heavy wood—made of plank—very heavy.

Q. Oak plank?

A. Couldn't say positively what kind of wood it is. It is very heavy material.

Q. Mr. Sutherland, you may describe to the jury now whether, when you were on that pin, as you have described, you had any warning that the engine was going to move.

A. No, sir; no warning at all.

Q. How near to the edge of the apron was the top of the cab?

A. As near as I can judge, betwixt two and a half to three feet.

Q. How far would the engine have to move before crushing your leg?

A. The distance what I told you back. It would just have to move that distance back to catch me.

Q. Did you know that the engine was moving until you were caught?

A. No, sir; I had no knowledge.

Q. What time of the day or night was this?

A. It was betwixt one and two o'clock of night.

Q. What was the sort of a night?

A. Well, it was middling dark and middling windy.

39 What was the fact about your lantern being burning?

A. It was burning when I put it behind me on the top of the cab.

Q. Can you describe the force with which the engine came?

A. No, sir; I couldn't.

Q. Whether it came rapidly or not?

A. It must have come rapidly, because I had only just climbed up here and was reaching—put the trap-door down; I don't suppose I was there over a minute; it had only two and a half to three feet to move.

Q. What was the effect of that collision with your leg?

A. Well, it crushed my leg and broke the bone so that amputation had to be.

Q. Before going to that I will ask you what about your employment by Mr. Gunther; you may tell the jury what you were employed to do.

A. I was employed as a tender, to tend the engines, and Edward Lewis was the hostler.

Q. You may tell the jury what Mr. Gunther said to you, if anything, that you would have to do.

A. I had to work under Mr. Lewis, the hostler.

Q. He said to you that you would work under Mr. Lewis, the hostler?

A. Yes, sir.

Q. State who was in charge of that engine and who moved it.

A. Edward Lewis had charge of the engine and moved it to this apron No. 11, that we had taken the coal —, and then he had charge of it when I was caught—when he moved it back unbeknownst to me.

Q. What was the fact as to that being the usual way to raise that apron and close that trap-door?

A. Yes, sir; that's the only way it can be done.

Q. Can the engine be moved at all, either backward or forward without putting up that apron?

A. No, sir; it can't; it will catch the tool-box behind, and
40 it can't go back on account of the apron would be torn off,
or the cab of the engine would be destroyed.

Q. It can't be moved either way, then?

A. No, sir.

Q. You have described that your leg was broken below the knee?

A. Yes, sir; and injured at the knee.

Q. Mr. Sutherland, I wish you would designate by name or number, or some other means, the engine that did this mischief?

A. It was No. 212.

Q. Describe the breed of the engine or what kind it was.

A. It was what they call a mogul engine.

Q. You have spoken of your injury; you may tell the jury the manner in which the injury existed, and what injury there was, a little more definitely, to your leg.

A. The leg was broken below the knee, and the doctors split the knee open, and the knee was split and fractured so they couldn't save it.

Q. The knee-joint was fractured?

A. Yes, sir.

Q. After the injury where were you taken?

A. To the round-house.

Q. By whom?

A. On the engine I was hurt on.

Q. How long did you remain in the round-house?

A. I don't remember; not very long—long enough to get a little truck and get me a drink and put some covers around me—a bed like.

Q. How long do you think?

A. Not more than half an hour.

Q. Where were you carried then?

A. I was run up the yard, right behind my own place, and carried by these men over to my own home.

Q. What physician took care of you?

A. Dr. Young dressed the leg the most; Dr. Spooner amputated it and Dr. Cling and Dr. Young.

Q. What physicans first came to you?

A. Dr. Young, on the night I got hurt, and in the morning Dr.
Cling and Dr. Spooner came.

41 Q. Dr. Cling of what place?

A. Plymouth.

Q. Dr. Spooner of what place?

A. Republic.

Q. They visited you the next morning?

A. Yes, sir.

Q. When was any surgical performance had upon the limb?

A. Well, they counselled on the limb that morning, and they wanted to take it off, and I objected, until the next morning; I thought they might save the limb or something.

Q. What was done in way of examining the knee-joint?

A. The surgeons examined it thoroughly and counseled on it.

Q. What was the fact as to its being painful or otherwise—the examination?

A. It was very painful—the examination.

Q. Was there any cutting done?

A. No, sir; not on the first morning; I wouldn't let them amputate it then.

Q. When was the amputation made?

A. The next morning about ten o'clock, as near as I could judge.

Q. Was you put under the influence of chloroform?

A. In the amputation?

Q. Yes.

A. Yes, sir.

Q. Now, Mr. Sutherland, will you just state to the jury what your experience was from that time forward until the healing of that wound?

A. Of my limb?

Q. Until the healing of that limb?

A. Well, I had great misery and suffering.

Q. State if any abscesses formed on your leg.

A. Yes, sir; there was a large abscess here, here on my thigh; I could most put my hand in; and then there was one on this side of the leg; this one had a pipe in it, and the medicine they put in here came out underneath the end of the stump in two or three holes.

Q. What was the condition as to inflammatory action?

A. I couldn't say.

Q. Was it swool-en badly?

A. Yes, sir; this side was swool-en very bad.

42 Q. How far up the body?

A. Up under my arm on the right side, before this abscess broke on my hip.

Q. How many of these abscesses formed?

A. There was 2 of them.

Q. One after the other, or both at the same time?

A. Both to the same time.

Q. Where was the other one?

A. On the inside of the limb—about here; and there was a pipe in that that went up in my limb.

Q. Was there a pipe formed from the upper one at the hip which ran down under to the stub?

A. Yes; the medicine they put in at the hip here came out underneath at the stump in some small holes.

Q. How long before you got out on crutches?

A. It was about two months as near as I can judge.

Q. State how it was as to being painful or not, that wound, during those two months.

A. Yes, sir; I suffered a great deal with those abscesses.

Q. What was the fact about it discharging a great deal?

A. It discharged very freely on the first breaking of the abscesses, and after that it didn't discharge so much.

Q. How long before those abscesses healed up?

A. This large one didn't heal up until after I had been out on my crutches, very near three months.

Q. Mr. NEWBEGIN: I understood you to say you got out on your crutches in two months?

A. No; I was about two months in bed before I could walk on my crutches, and I was about a month before I got outside of the house; that was about three months.

Q. Mr. WALKER: How long was it before you walked about outdoors on crutches?

A. Well, I kept practicing with the crutches in the house, you know, during the time I was gaining strength for to go out.

Q. How long was it before you got out on crutches?

A. I was two months in bed and then I got out in a month.

43 Q. When, if ever, was that stump healed?

A. Well that stump wasn't thoroughly healed up when I got my limb.

Q. We don't know just when you got your limb yet.

A. It was in July.

Q. July after the hurt?

A. Yes.

Q. The July following?

A. Yes, sir.

Q. 1882?

A. Yes, sir.

Q. Since that time what has been the fact about its getting irritated and breaking out?

A. There is times there is abscesses and I have to take off my limb.

Q. Describe them, if you please, to the jury.

A. Well they gather on the inside of the limb, principally.

Q. Above, or at the end of the stump?

A. At the end of the stump; at the upper end and at the bottom, here, breaks open quite often—that is, that festers and gets all raw on the bottom of the stump; it is raw now.

Q. Do you say it forms above at your thigh—on the inside of your thigh?

A. There are lumps there.

Q. When one forms there what is the result from it?

A. Well it breaks and discharges.

Q. At that point?

A. Yes.

Q. How frequently do these occur?

A. Well these don't occur very often now; I had one—well it is very near a year since I had one on my limb—that is, to break, to cause me much misery.

Q. On the upper part of the thigh, on the inside of it?

A. Yes.

Q. How far away from the end of the stump?

A. Oh, perhaps eight inches from the end of the stump.

Q. How frequently does the stump become irritated?

A. It is irritated a good part of the time; it is irritated now.

Q. What is the effect on your wearing your cork leg?

A. Well, the use of the limb, do you mean?

Q. When it is irritated can you use the cork leg?

44 A. No, sir; not when it gets real bad; I have to dispose of the limb and use my crutches.

Q. How long has that continued since you began to use that cork limb?

A. I have went without the limb from three to four days at a time.

Q. How long have you found the limb painful at the present time?

A. Well it has not been much at the present time.

Q. How long has that continued; you say you can't wear your limb now?

A. Well it is irritated at the bottom of the stump.

Q. How long has that continued this last time?

A. Oh, it has been as much as two months since it first broke out, but I keep putting stuff on it to heal it like—to keep it from getting worse, you know.

Q. You mean to say it has annoyed you now for 2 months.

A. Yes, sir.

Q. Mr. Sutherland, what is your trade or business?

A. I was a mason by trade.

Q. What does that include?

A. Well I principally done plastering; I have laid——

Q. What, in your business, could you, prior to your injury, earn in the proper season?

A. I could earn from two and a half a day; I have run up as high as four dollars a day and five.

Q. During what season of the year?

A. Probably eight months in the year I could earn from two and a half; I have been hired for three dollars a day for the whole season and worked as a jour.; when I worked by the yard I could earn more.

Q. Are you able to do that business now?

A. No, sir.

Q. Have you been since you were hurt?

A. No, sir; I could not do anything with it now.

Cross-examination by Mr. NEWBEGIN:

Q. Mr. Sutherland, how long had you been in the employ of this company before you were hurt?

A. I went to work in 1882, the 16th day of January, and worked until the 30th day of January.

45 Q. About two weeks, then, in all?

A. Yes, about 13 days.

Q. Between what dates?

A. It was from the 16th to the 30th.

Q. Had you ever worked for the company before?

A. Yes, I worked in 1881.

Q. How long then?

A. In the neighborhood of two months; I went to work in February, the 8th, and I don't recollect the day that I quit, but it was in the neighborhood of two months.

Q. Was that the only time that you worked for them?

A. That is the only time I ever worked for the Baltimore and Ohio.

Q. What work had you ever done for other railroad companies?

A. I never worked for any other railroad companies.

Q. What were you doing in the year 1881 for the company?

A. I done some repair- at the hotel.

Q. For the company, in 1881, when you worked for the company?

A. I was a laborer; I was working partly at the ash-pit, cleaning the ashes out from the engines as they came in.

Q. Did you coal any engines then?

A. Once in a while I did, when they needed me.

Q. You did such work as they called on you to do?

A. I was a laborer there in the yard at the round-house.

Q. The round-house is in the yard, isn't it?

A. No, sir; not up in the yard.

Q. Who employed you in 1881?

A. Mr. Gunther.

Q. Why did you quit the service then?

A. Because I could do better at my trade.

Q. Did you stay there in Chicago Junction until the next winter?

A. Yes, sir.

Q. Did you work at your trade all the time?

A. All the summer—yes, sir.

Q. When you went to work for them again did you solicit employment?

A. How is that?

Q. When you went to work for them again did you ask them for work?

A. Yes, sir.

Q. Who did you ask?

A. I asked Mr. Gunthers.

Q. Did he say he would give it to you?

A. Yes, sir.

46 Q. And he set you at work at the same work you had been doing the year before?

A. No, sir.

Q. What was said when you went to work the second time for the company about the work you were to do?

A. He said I would have to be a tender—tending engines.

Q. Just what did you do in tending engines?

A. Coaling and giving them sand and water.

Q. Cleaning out the ashes?

A. Cleaning the ash-pan out.

Q. Just as you had the year before?

A. No, sir; then I was in the ash-pit principally all the time, heaving ashes out of the pit where they dropped down in that long pit.

Q. Didn't you, in 1882, do any of that work—carrying out ashes?

A. No, sir; I didn't clean the ash-pit; I cleaned out the ashes under the ash-pan into the pit; before I cleaned out the ash-pit.

Q. Hadn't you, in 1881, cleaned the ash-boxes into the pit?

A. I don't recollect of.

Q. But you did assist some in coaling?

A. Yes, sir.

Q. Assisted for this same hostler, Mr. Lewis?

A. Yes, sir.

Q. In 1881?

A. Yes, sir.

Q. Were you at work at your trade of mason all the time after you left the service of the railroad, in 1881, until you went to work for them again in 1882?

A. I was the most of the time; there was a short time in the spring I lost a little time.

Q. What wages did you get then?

A. I worked principally by the yard; I had from two and a half to three dollars; I had the profit on a man and the employ- of men sometimes.

Q. What wages did you average in the summer per day?

A. I averaged two and a half dollars a day.

Q. For the whole summer?

A. For the whole summer.

Q. You say you solicited employment in 1882 again, and went
about this other work, which was somewhat different. Will
47 you state to the jury what you said to Mr. Gunther when you
went for employment?

A. I asked him for employment, and he said he would give it to me.

Q. What wages were you to have?

A. A dollar and ten cents, I think it is.

Q. Per day?

A. Yes, sir.

Q. And pay your own board?

A. Yes, sir.

Q. What were your hours of work?

A. I think it was ten hours we were to work; I most forget whether we went to work at six or seven o'clock in the evening. We quit when the morning hands came on. I was night-workman the last time.

Q. Did you do anything for the company during the day-time?

A. No, sir; I was hired to work nights the last time.

Q. Mr. Gunther was master mechanic of the shops there?

A. Yes, sir.

Q. Who was yard-master at that time; do you know?

A. I couldn't say who was yard-master.

Q. You don't know?

A. No, sir.

Q. Who else—what other hands were engaged in the same employment with you?

A. James Moore.

Q. Any others?

A. No, sir.

Q. Was James Moore working days or nights?

A. He was working nights.

Q. Didn't they have any hands working in the day-time at the same employment?

A. Yes; they had another crew in the day-time.

Q. Who were engaged in that employment in the day-time?

A. I couldn't tell you who they were.

Q. You don't know them?

A. I knew their faces and names, of course, but I forget who they were.

Q. You say you were injured between one and two o'clock at night?

A. Yes, sir.

Q. Did you give the day of the month?

A. It was the 30th night of January.

Q. On the night of the 30th or the morning of the 31st?

A. Yes, sir.

Q. I understood you to say it was a middling dark night?

A. Yes, sir.

Q. You had a lantern?

A. Yes, sir.

48 Q. You said you put that on the top of the cab?

A. Yes, sir.

Q. How long before the accident had you climbed up there and put the lantern in that place?

A. As quick as I could place my lantern behind me I climbed right up on the apron—up from the tool-box on the tender.

Q. That was where you were in the habit of placing your lantern?

A. Yes, sir; when I was at this end of the apron.

Q. You placed it where you pleased?

A. Yes, sir.

Q. Nobody controlled you about that?

A. No, sir.

Q. It was your duty to take care of your own lantern?

A. Yes, sir.

Q. Did you assist in coaling any other engines that night?

A. Yes, sir; we had coaled up to that time.

Q. How many engines had you coaled?

A. I couldn't say.

Q. About how many?

A. I couldn't say just how many; I didn't keep track; but we kept working as fast as they came in; we kept putting them away.

Q. When the engines would come in on the trains was it your duty to coal them when they came in from both directions?

A. Yes, sir.

Q. How many lines centre there?

A. There are two divisions that the engines stop there.

Q. What are they?

A. The Lake Erie and the Chicago.

Q. From the South, too?

A. Yes; from the South and from the West.

Q. Both passenger and freight engines?

A. Yes, sir.

Q. Was it your duty to assist in coaling both kinds?

A. Yes, sir.

Q. Did I understand you that the trains coming down over the Sandusky division stopped at Chicago Junction and are coaled?

A. No, sir; the trains going South we didn't have anything to do with them.

Q. Then you leave out the Sandusky division?

A. Yes, sir.

Q. So you coaled the engines coming in from the West in the Chicago division and those coming up from the South for the Chicago division?

A. Yes, sir.

49 Q. You didn't coal engines that came up from the South to go to Sandusky division?

A. I didn't know when they came; they might go to Sandusky the next morning or go back on the Lake Erie.

Q. Was it your business to assist in coaling engines that came up from the South to go to Sandusky?

A. Yes, sir.

Q. About how many engines came in there during the night that you aided in coaling at that time?

A. I couldn't say positively. Some nights we would have eight or ten, and some nights we would not have so many—according to the business on the road.

Q. Were they not taken away, and after they were coaled, or before they were coaled, put into the round-house?

A. They went into the round-house.

Q. Did you coal and assist in watering the engines immediately when they came in before they went to the round-house or when they came from the round-house to take the train?

A. They were watered before they went into the round-house.

Q. As soon as they came in?

A. Yes, sir.

Q. And the engineer left them immediately on arriving at Chicago Junction?

A. He left them on the side track.

Q. And that was up at the coal-chute?

A. Yes, sir.

Q. Had you given this engine water that night before you went out?

A. No, sir.

Q. Was it your business to go there and assist in coaling *there* engines without being called especially to it by any person as soon as they came in?

A. The hostler took charge of the engine.

Q. What I ask you is, as soon as the engine came in were you keeping watch of it and did you go to help coal it?

A. Yes, sir.

Q. As a matter of course that was your business?

A. Yes; that was my business.

50 Q. Just as soon as the hostler went and took charge of the engine you went to aid in coaling?

A. Yes, sir.

Q. And didn't require to be called for that by anybody—it was your duty to do it?

A. Yes, sir.

Q. You went and coaled this engine the same as any other?

A. Yes, sir.

Q. You got upon the tender of the engine?

A. Yes, sir.

Q. And the engineer or the hostler placed it at its proper situation to take coal?

A. Yes; alongside of the apron, No. 11 pocket.

Q. That is one of the ordinary numbers of the coal-chute?

A. Yes, sir.

Q. And the engine ran up here and it was your duty to keep watch of it?

A. Yes, sir.

Q. You would go and get up on the engine—on the tender, did you not?

A. Yes, sir.

Q. The hostler, whoever he is, takes the engine to its place and you get up on the engine immediately as it comes in its place and you pull out the pin and take the apron down and let the coal down?

A. Yes, sir.

Q. That is your business?

A. Yes, sir.

Q. And it is the business of the hostler to put it in place?

A. Yes, sir.

Q. When you would get through you would tell him it was all right?

A. Yes, sir.

Q. And to start up?

A. Yes.

Q. It is your business to tell the hostler to start up when you are through?

A. Yes; when the apron is put up.

Q. Did you give him the signal that night?

A. No, sir:

Q. He suddenly started before you gave the signal?

A. Yes, sir; my back was turned to the engine.

Q. He didn't take special notice of where you were?

A. I didn't know as he did?

Q. It wasn't his business to take special notice of where you was?

A. I don't know.

Q. As I was saying, it was the hostler's business to attend
51 to his engine; he was not expected to watch you?

A. No, sir; I had to do my work and he——

Q. And he had to do his?

A. Yes.

Q. As I said before, it wasn't his special business to watch you while you were doing your work?

A. He ought to see that the apron was up.

Q. (Question repeated.)

A. He ought to have seen that the apron was in its proper place.

Q. Will you answer the question; you understand it, do you not?

A. After the coal runs down we are supposed to put up that apron and set that pin to shut off the coal.

Q. The COURT: Because you have got enough?

A. Yes; all the coal in that pocket will come out before we close it up, and then the engine has got to be put in its place before the engine can pass either way.

Q. Mr. NEWBEGIN: Is it the special duty of the engineer to watch you while you were doing your work?

A. I couldn't say whether it is or not.

Q. You don't know in regard to that?

A. No.

Q. But it his duty to wait before he starts the engine for the signal?

A. Yes, sir.

Q. You are quite sure of that?

A. Yes, I am positive of that; we had to get the apron in its proper place.

Q. And then it was as much your duty to give him the signal to start as it is his duty to wait for it?

A. Yes.

Q. It was your duty to give him the signal?

A. Yes.

Q. Didn't you give him the signal to start that night?

A. No, sir.

Q. You did, however, go about the performance of your duty, in letting down the coal here that night, just as it was your custom?

A. Yes, sir.

Q. It was your custom to place your back to the engine?

A. I had to, to get up to close the pocket.

52 Q. It was your custom to place your back to the engineer after the coal was let down when you went to close up the apron?

A. When I was on this side of the apron it was. If I should happen to have been on the other side of the apron I would have got up on the other side.

Q. It was your custom, when you were situated as you were that night, letting the tender coal, to place your back to the engineer while you were closing the apron?

A. Yes, sir.

Q. And you were following that custom that night?

A. Yes, sir.

Q. Where were you standing? Tell the jury, on the model, how the apron was.

A. My left foot was on this bolt and my right limb hung below my left foot.

Q. There was a bolt that protruded through there, and you had your left foot on it?

A. Yes, and my back turned over this way, closing this down.

Q. Your right foot would have been thrown out, would it not?

A. My face was facing this way.

Q. Was your right leg thrown out here?

A. My right leg was on the outside of that.

Q. Your right leg was thrown out there loose, then?

A. Yes, sir.

Q. And you were standing, and what were you holding on to?

A. To the chain.

Q. How did you attempt to throw up the apron?

A. I was closing this door, and while I was closing this door he moved the engine back and caught my limb betwixt the apron and the top of the cab; I was in this position, and my right limb hung below that.

Q. So it didn't catch your left leg or foot?

A. No, sir.

Q. Caught merely your right, which was hanging down loose?

A. Yes.

Q. You was holding with your right hand to the chain and pushing that door up with your left?

A. Yes, sir.

Q. Didn't that door close automatically, by weights?

A. No, sir.

53 Q. The apron does close automatically by weights?

A. Yes; as soon as we come down we raised it, and the weight held it, and it closes after it goes up to a certain height.

Q. When you went to climb up there to close the door where was the hostler; where was Mr. Lewis?

A. He was on the engineer's side of the engine.

Q. Which way was his face?

A. It was faced to the east.

Q. Towards the front of the engine or towards you?

A. The engine was faced towards the round-house—to the east.

Q. I don't care which way the engine was facing; here was the coal-chute; here was the top of the cab, and now where was the engineer?

A. In his proper place down in here.

Q. Which way was his face?

A. I couldn't see; my back was towards the engine.

Q. When you went up did you notice where the engineer was?

A. Yes; he went in to handle the engine.

Q. His face was towards the front of the engine?

A. At the time I went up.

Q. He was attending to his business there?

A. Yes.

Q. Did you say anything to him when you went up?

A. No, sir.

Q. It was his business to stand there in care of the engine and wait for your signal?

A. Yes.

Q. When you went up he was attending to that business?

A. Yes.

Q. How was it possible, with your left foot on here and your right foot curled up, as you say, and holding on here, to get it caught between here?

A. My right foot was in this position, my right leg was hanging straight down, and the left one was in this position.

Q. Tell us where your leg got caught.

A. My right leg was hanging straight down.

Q. Your left foot was where?

54 A. Here; high enough that it didn't catch this foot; if it had been lower both feet would have been gone.

Q. Mr. Sutherland, who made this model of the coal elevator?

A. I had a carpenter make it.

Q. Who made this engine?

A. My brother-in-law made it—John Whittaker.

Q. How do you know they are of the relative height with the mogul engine which you was using that night and the coal-chute there?

A. I couldn't say positive, but I can say where my foot was standing and how my limb was.

Q. Have you any knowledge that these represent the relative height of the engine that you were on and the coal-chute that night; were the heights here comparatively the same?

A. I couldn't say about the heights, because that is small and the other one was large, you know.

Q. Have you any knowledge that this size in this apron is comparatively of the same size of the apron of the coal-chute where you were hurt?

A. No, sir; I couldn't say to that.

Q. You don't know about that?

A. No, sir.

Q. Have you any knowledge of the height of this cab roof that the top of the cab is relatively of the same h-ight of the engine which you call the mogul, on which you were that night?

A. No, sir; I couldn't say.

Q. This model of an engine was made first, without any reference to a mogul engine?

A. Yes, sir.

Q. It was made before you were hurt there?

A. Yes, sir.

Q. So that as to the relative h-ights and sizes you know nothing?

A. I couldn't say as to that.

Q. This don't represent the mogul engine?

A. No, sir; it ain't a model, but the cab is the same to the mogul.

Q. The tender is not, though?

A. I couldn't say positively as to the tender, but it represents the engine as near as can be.

Q. Was your left leg hurt at all?

A. Not at all, sir.

55 Q. Or foot?

A. Not a mark.

Q. Were you injured in any other place that night except on your right leg?

A. No other place but my right leg and knee.

Q. Had you ever been warned that that was a dangerous business and that you must look out for it?

A. No, sir.

Q. You knew it was, however?

A. No, sir; I didn't fear any danger.

Q. Didn't you know that you were engaged in a business that was liable to accidents?

A. In railroad employment, of course, there is more or less accidents.

Q. And you knew, did you not, that that very work you were doing required extreme care to avoid accidents?

A. Yes; all railroad work must require care.

Q. You realized it, did you not, Mr. Sutherland?

A. I would be injured, of course, if the persons wouldn't be careful.

Q. You knew at that very time that the work you were doing required extreme care on your part to avoid accidents?

A. Yes, sir.

Q. Didn't this same man, Mr. Lewis, the hostler, as you call him, caution you two or three times before the injury about your carelessness?

A. No, sir; he never mentioned it.

Q. Do you swear to the jury that he never called your attention to it?

A. I will swear to the jury; yes, sir.

Q. You say that at times your leg pains you still, did you not?

A. Yes, sir.

Q. You have a cork leg?

A. Yes.

Q. Why haven't you it on now?

A. Why haven't I it on?

Q. Yes.

A. I like you to see the condition I am in, and the leg is sore on the end; you can look at it if you wish to; the leg is sore now.

Q. Is it any sorer than it has been while you have been wearing your cork leg?

A. It has got better since I took it off.

56 Q. Is it any sorer to-day and yesterday than it was when you were in the habit of wearing it?

A. No, sir.

Q. So, for all the soreness, you could wear your cork leg?

A. Oh, I might wear it, of course.

Q. You didn't leave it off under the advice of any one, did you?

A. No, sir.

Q. How long have you been wearing the cork leg?

A. Well, I got it two years last July—two years ago.

Q. That was before the accident happened.

A. No.

Q. You got it, then, six months after you were hurt?

A. About six months after I was hurt.

Q. And your leg had got so you could wear the cork leg; your wound had healed sufficiently from the amputation?

A. It was raw at the time I started to use it.

Q. Don't you think you started to use it too soon and that has caused it to be more tender since?

A. No, sir; I don't think so.

Q. But occasionally your stump gets sore there?

A. Yes.

Q. And you leave the cork leg off awhile and it gets better?

A. Yes, sir.

Q. How long usually do you have to leave it off until it gets better?

A. I have gone three or four days.

Q. But the most of the time you can wear the cork leg without difficulty?

A. Yes; I wear it most of the time.

Q. You leave it off nights, as a matter of course?

A. Yes; I take it off every night.

Q. Were you subject in your work there at all to anybody else's directions—besides Mr. Gunther's general directions, I mean?

A. By Mr. Gunther.

Q. You were employed by him?

A. Yes, sir.

Q. And you were subject to his general orders in all things?

A. There was a foreman there—Mr. Kimmer—in the shops.

57 Q. What was his immediate duty?

A. In the shops mostly.

Q. Were you subject to his orders at all while you were at work there?

A. I suppose if he ordered me to do anything I suppose I would have to do it, but Mr. Gunther hired me.

Q. Then you think that if the other foreman about there had called on you to do work it would have been your business to have done it?

A. Yes, sir.

Q. Was Mr. P. H. Burke agent at that time?

A. No, Mr. Burke wasn't agent; there was another gentleman there agent. Let me see, what was his name? Well, I can't think of his name, but Mr. Burke took his place.

Q. It was a man that had been conductor?

A. He had been a conductor or some employment.

Q. It was Mr. S. C. Moore?

A. Moore; yes.

Q. He came there when Mr. Burke went up to Sandusky, didn't he?

A. Yes, I think so.

Q. And when Mr. Burke returned there he left?

A. Yes.

Q. You knew the agent there had general control of the yard too, didn't he—that was a part of the agent's business?

A. I don't know.

Q. You don't know that all around the round-house there, including the yard, was subject to the direction of the agent?

A. I couldn't say.

Q. What is your business now?

A. I am keeping a saloon at present.

Q. At Plymouth?

A. Yes, sir.

Q. How long have you been engaged in the business?

A. I have been engaged there for two years.

Q. Are you making as much at it as you were at your trade?

A. I am making barely a living. I make a living to support my family at it.

Q. I asked you if you were making as much at it as you were at your trade when you quit working at it?

A. No, sir.

58 Q. Haven't you stated once or twice that you didn't know how you got hurt?

A. No, sir; I never stated that.

Q. To nobody?

A. No, nobody. I know how I got hurt.

Q. I ask you whether you ever stated that?

A. No, sir; I never have stated it.

Q. You stated in your examination-in-chief, I think, that the distance of the apron from the cab—from the edge of the cab—was two and a half to three feet to where you got hurt?

A. Yes, sir.

Q. Did you give any special attention when you went up there to notice the distance?

A. I don't need to make any special notice, but I could judge from the distance I had to get up.

Q. You did observe the distance as you went up and your impression now is that it was two and a half to three feet; is that what you wish to be understood?

A. Yes, sir.

Q. You didn't know that the engine was backing up until it struck your leg?

A. I didn't until he had me fast.

Q. You were not on the engine, so that you couldn't feel the motion of it?

A. I wasn't on the engine at all. I was off from the engine.

Q. What enables you to swear to the jury that the engine moved back rapidly if you didn't know anything about it until it caught you?

A. I was off the engine.

Q. I know you were off from the engine, and were not on the engine, and you were back towards it; how can you swear that it moved back rapidly?

A. I don't think I stated that it went back rapidly.

Q. Then I misunderstood you.

A. I don't think I said that.

Mr. Doyle: He said it must have moved back rapidly.

Q. Mr. Newbegin: Did you testify what your counsel now says you did, that from the manner of your injury you knew that the engine was moving rapidly?

A. No, sir.

59 Q. Didn't you make some statement thus far known to the jury, Mr. Sutherland, about the engine moving back rapidly when you were hurt?

A. No, sir; I did not.

Q. Nothing of the sort?

A. If I had known it was moving I could have saved my leg.

Q. Didn't you use the word "rapidly?"

A. I don't think I did.

Q. Didn't you answer a question then that was put to you in which the movement of the engine was named as coming back rapidly?

A. I don't recollect of saying anything about "rapidly" at all.

Q. Was your light—lantern—burning when you put it upon the cab?

A. Yes, sir.

Q. Were you not, now, sitting on the cab that night at all before you took coal?

A. No, sir.

Q. You hadn't been up there before you were injured?

A. No, sir.

Q. Do you know whether your light was burning at the time you were hurt or not?

A. I couldn't say; but it was when I put it there.

Q. How long had you put it there before you were hurt—how long a time had elapsed?

A. It was but a very short time; I couldn't just say.

Q. You didn't take any further notice of the lamp, of course?

A. No, sir.

Q. Had you coaled that particular engine before, ever?

A. I don't recollect coaling it before; I might have done it; I didn't keep the number of the engines.

Q. How do you know, then, it was No. 212?

A. I took particular notice as it went past.

Q. Had you known before what the number was, and do you swear from your previous knowledge?

A. No, sir; I know it was 212.
Q. Because you noticed that night before you were hurt?
A. Yes, sir.
Q. Is that why you swear so?
A. Yes, sir.

60 Re-examination:

Q. You may, if you please, describe the distinction between a mogul and an ordinary engine, just come down here and explain it to the jury on this model, and show them the difference, if there is any, about the cab and about the tool boxes, and everything that affects the injury.
A. I don't know as I can tell.
Q. How is it as to the mogul engine having a cab here of this description, or similar?
A. It is similar to this—like the passenger engines.
Q. Describe to the jury what means there are of getting up here onto this pin.
A. There is plenty of room for a fellow to get up on there.
Q. What, if anything, was there out this way which would prevent the engine going either way?
A. On most of the engines there was a tool-box here.
Q. How was it on that one?
A. I couldn't say.
Q. Then there is no material difference, as you understand it, in the division of the cab?
A. No, sir.
Q. In regard to your duty, Mr. Sutherland, you may state to the jury whether you had any right to give any orders to the hostler, or whether your duty was simply to notify him that your work was done?

(Objected to by defendant by its counsel.)

The Court: That is examination-in-chief; but if you forgot it I will allow you to ask it now. He has said before that it was his duty to give the signal when the work was done.
Q. Mr. Walker: State whether you had any right to direct the movements of that engine.

A. Not until I got the apron and everything in its proper place so that there would be no danger for her to move.
Q. Then what was it your duty to do?
A. I would tell him it was all right.
61 Q. Had you any other duty, except that in reference to that engine, as to ordering the hostler?
A. No, sir.

Recross-examination:

Q. Where was the tool-box located in this engine?
A. Down here—a small one and a large one here; I wouldn't be positive whether there was one in this engine.

Q. The tool-box on this mogul engine?

A. I can say positive that there was one down here.

Q. Then, in moving forward, the tool-box wouldn't have hit this apron when it was down—that tool-box there?

A. No.

Q. You don't know whether there was any tool-box here or not?

A. I am not positive.

Q. Why do you say that, in moving forward, the engine would strike the tool-box if you are not certain that there was a tool-box here on the engine which you were using?

A. The majority of the engines has got the tool-box; I think there was a tool-box on this one; I am not positive; I can say positive there is a tool-box down here, because I got onto that tool-box to climb up on the pin.

Q. You did that on this very night when you got hurt?

A. Yes, sir.

Q. You don't know that there was another tool-box to that engine, do you?

A. No, sir.

Q. Isn't there means from the tender, so you could stand on the tender and close that door and throw up the apron without climbing up there?

A. No, sir; I couldn't.

Q. Wasn't there a pull-y, which went over here, by which you could pull it down and pull up the trap-door?

A. No, sir; that is all the pulley there is.

Q. Wasn't there any means to any of these pockets or coal-chutes of closing that door without climbing up to it?

A. No, sir.

Q. How is the door fastened?

62 A. With a pin there; there is a lever comes in here.

Q. You mean the bar?

A. Yes, and then we took another pin here and fastened that lever so that the coal couldn't get out until it was released.

Q. After you closed the door you have to raise that lever in order to hold the door shut?

A. Yes.

Q. That is after the apron goes up?

A. Yes, sir; the apron goes up by weights.

Q. If you push the apron up with the weights will it not shut the door?

A. No, sir.

Q. Can't you do it that way?

A. No, sir.

Q. The COURT: Explain to the jury why.

A. Your right leg was hanging down there; there was no room.

Q. If you had straightened clear up that right foot wouldn't have been below?

A. In the position you have to stand in you have got to get in this position to get low enough to close it; there is cinders and dust of coal which will settle underneath, and you have to get it cleaned out before you can get the apron back to its proper place.

Q. Suppose you had straightened up?

A. I would be too high; a person has to get into this position for to do it; I had to clean this underneath, so that this goes down—so that this little pin will come in and close it.

Q. Why had you to be in a stooping position to do that?

A. Because this was low; if it had been up high I would have been in a different position.

Q. Mr. Newbegin: You were simply pushing this down; you were not raising it up?

A. No, sir.

Q. Were you in the very act of pushing this down when you were hurt?

A. I was getting it down to its place.

Q. What hindered you, while you were holding on there, from keeping your right leg bent up; couldn't you have kept
63 your leg bent up away from that cab?

A. No, sir.

Q. You knew the tender was there?

A. Yes.

Q. Do you pretend to say that there was anything which would keep your right leg from being bent at the end? What was there to hinder?

A. There wasn't anything to hinder, but a person can't keep his leg up.

Q. I ask you what there is to hinder you when you were holding onto the chain?

A. I couldn't get it up.

Q. What was there to hinder you when your were hanging there from thrusting your foot forward this way, so as to be out of the way while working with your left hand?

A. I didn't expect that I was going to be injured; I wouldn't have got there if I had expected to be injured; I didn't look for it to move; I wasn't prepared for it to move.

Q. But there was nothing in the nature of things but you could have kept your foot forward out of the way of the engine?

A. I don't think I could; in the position I stood I couldn't.

Q. (Witness was here shown an application for membership in the ——— Relief Association.) Is this your signature?

A. Yes, sir.

Second re-examination:

Q. When that trap-door is open what is the fact as to your being able to close it until the coal flows out of it?

A. You can't close it with coal in. The pocket has got to be emptied, and you have got to clean out below in order to get the apron in its proper place.

Plaintiff further, to maintain the issue on his part, called [as] a witness Henry K. Spooner, who, being first duly sworn, testified as follows:

Direct examination by Mr. Walker:

Q. You are acquainted with the plaintiff in this case, Mr. Sutherland?
A. I am; yes, sir.
Q. You know him?
A. Yes, sir.
Q. Doctor, what is your profession, and what was it in 1882?
A. I am a practitioner of medicine.
Q. And surgery?
A. I do some surgery; yes, sir.
Q. You may tell the jury if you were called in 1882 at any time to Mr. Sutherland to see him.
A. I was called to see him—I think it was on the morning of the 31st of January, in the latter part of the month anyhow, in 1882, at Chicago Junction.
Q. Where were you practicing then?
A. At Republic, Seneca county, Ohio.
Q. How far is that from Chicago Junction?
A. About 16 miles, I think.
Q. When did you see him first at that time?
A. I think it was on the morning of the 31st of January.

The Court: I do not understand that there is any denial of the fact of the injury.
Mr. Doyle: But the character of the injury may indicate how it occurred.
Mr. Walker: I think it is important on the question of damages to prove how this wound was treated, how it was, and what was required.

Q. Will you describe the character of that injury as you found it.
A. The leg was injured from about midway between the knee and the ankle to, perhaps, three or four inches above the knee, a small distance above the knee, requiring, in my judgment, amputation of the leg above the knee. It was injured through the knee joint, the bones fractured above the knee and below the knee.
Q. You amputated the leg?
A. I did.
65 Q. And subsequent to that what was required for the treatment and what was developed from time to time until it was cured?
A. What do you want to know?
Q. I want to know what, if any, development of abscesses.

The Court: Do you mean about these ulcers?
Mr. Walker: Yes, sir.

The Court: I understand that there is no controversy about that.

Mr. Newbegin: No; we do not care how he treated it.

Q. Mr. Walker: State if there was any injury at the foot.

A. I don't remember that there was.

Q. Over what space were the bones fractured?

A. The bones of the lower leg below the knee-joint were crushed—they were broken and crushed—broken in small pieces—fractured crosswise of the bones and also lengthwise of the bones; the lower bones—the larger bone of the leg—was split lengthwise, opening up into the wound; the bone of the thigh leading down through was fractured. A portion of the outer part of the bone was fractured off from the bone.

Q. The Court: Give us what that indicated as to how it was done?

A. The idea that I formed at the time, and still hold to, was that the limb was caught between a moving substance and something that was still, and rolled and crushed just like you would turn it around.

Q. Mr. Walker: State if there were any abscesses formed at the hip.

A. A large quantity of matter was discharged and extended up into the hip to the body, discharging through the lower opening, and I think there was an abscess or two externally to the hip-joint in the soft portion about the bone—externally to the bone, however.

66 Q. Were there any pipes formed there?

A. I don't know what you mean by "pipe."

Q. What would you say he might expect from what you saw of his having irritation of the limb and abscesses form in the thigh afterwards?

A. From the amount of inflam-ation and suppuration in the limb, between the wound and the hip-joint, I should think it might impair the usefulness of the leg ever afterwards; I can't say to what extent; I speak more particularly in reference to the joint itself; I don't think that the joint itself was injured, but it was the tissues around the joint becoming constricted or hardened and their mobility interfered with by this inflam-ation external to the bone and the joint itself.

Q. That is outside of the periosteum?

A. Yes, sir.

Q. Would it have a tendency to interfere with the usefulness of the stump of the leg in using a cork leg?

A. I think it would; that was my opinion at the time, and I still hold the belief.

Cross-examination by Mr. Newbegin:

Q. How long did you treat this man, Doctor?

A. Well, I saw him, I think it was that first day of February that the amputation was made, and I saw him, I think, on the third day afterwards and dressed his limb—gave it the first dressing; I saw him several times after that in consultation or connection with Dr.

Young, of Chicago Junction; I could not say positively without referring to my memorandum book as to the number of times, but I think five or six times afterwards at intervals varying from three to five days; he would send me word and I would come up there and see him.

Q. Three weeks or such a matter?

A. I think I saw him during the fourth week.

67 Q. Did you assist at the amputation?

A. I believe I made the amputation.

Q. Was the leg amputated above the knee?

A. It was.

Q. How far above the knee?

A. I think at the union of the lower middle third of the femur; about that point; between the upper portion of the lower and the lower portion of the middle third.

Q. How high above the joint would that be—about?

A. Well, perhaps four or five inches, varying a little from the length of the bone in different persons.

Deposition of J. Brewbaker.

Plaintiff, further to maintain the issues on his behalf, called as a witness one JOHN BREWBAKER, who, being first duly sworn, testified as follows:

Direct examination by Mr. WALKER:

My business is that of hostler and engineer to some extent; have handled engines for the Baltimore and Ohio Railroad Company; have been engaged in that business about two years or more. In January, 1882, at the time of this accident, I think my business was hostler, but I was off sick at that time. I recollect of hearing of the injury to Mr. Sutherland, but was sick at the time; was engaged at Chicago Junction; had been engaged in that business before Sutherland was hurt; couldn't tell exactly how long—only a short time—four weeks or such a matter; remember of Mr. Sutherland's coming to work there.

Q. Will you tell the jury now what the duties were of the hostler? State if he had a tender or helper.

A. He had two helpers.

Mr. NEWBEGIN: He can tell what Lewis did, but what his
68 duties were, I think, has nothing to do with it.

The COURT: Oh, well, we want to know something about whose fault it was. (To witness.) If you know what the duty of the hostler was you may tell it.

Q. Mr. WALKER: How many helpers were on duty at one time with one hostler?

A. Two helpers and one hostler.

Q. You may tell now what were the duties of the hostler with reference to the engine.

A. The duty of the hostler is to take charge of the engine—to handle the engines and to tell his men what he wanted them to do. I don't know as that is the proper way to explain it.

Q. Yes; to tell his men what he wants them to do?

A. Yes.

Q. When the engine comes into the yard from the road what is the duty of the hostler in reference to it; what would be necessary for him to do with the engine; what was his duty in reference to it? Go through with it and state the whole duty.

The Court: You mean where he runs it to and what about it?

Mr. Walker: Yes.

Witness: His duty would be to take charge of the engine and see that the engine is all right, in the first place, and then say to his helpers, "We will go up and take water."

Q. The Court: If the engine comes in there what does the hostler do?

A. Handles the engine.

Q. He is called the hostler because he takes care of the fiery horse?

A. Yes, sir; because he takes care of the iron horse and handles it?

Q. It must be fed and watered?

A. Yes, sir.

Q. And they must be curried by being oiled up?

A. Yes, sir.

Q. Limbered up?

A. Yes, sir.

Q. Mr. Walker: He says to his men he is going to give her water, you say. Go right on and give the whole details of his duty—what it would be.

69 A. Suppose we have got an engine here. I take charge of this engine. I say to my helpers, "We will go down and take coal first." I am running the engine. Well, they tell me what pocket to go for such an amount of coal—say the 75th or the 100th pocket.

Q. The Court: Who tells you?

A. The man who has got the number of the pockets and the number of bushels of coal in each pocket.

Q. Mr. Walker: What do you do with the engine, then?

A. Then I move the engine down to the pocket he told me to set the engine at, and then, of course, they pull down the apron, and when I get the engine set all right——

Q. Who pulls down the apron?

A. The helpers—the two men that give the supplies—they pull down the apron and take the pin out which holds the lever up, knock the lever down and that lets the pocket open, and the coal being in there pulls the pocket right open as soon as the lever is knocked down, and then they have that pocket to shut.

Q. Come forward here and describe, if you can (on model), how that apron is adjusted, how it is drawn up after taking out the coal, how it is placed back, and state whether these pockets and aprons are all alike.

A. Yes, sir.

Q. How many of them are there there?

A. Forty on each side.

Q. Come forward here and describe this model—just how the men would close them up.

A. Well, it is not in shape so I can explain it so that a man can quite understand it.

Q. Give it as near as you can.

A. This apron projected down here in the center of the tender.

Q. The COURT: Comes out that far, does it?

A. Yes, sir; here I set this engine; I have moved this engine back to this pocket to take coal; well, then, when I have this en-
70 gine set all right, these helpers of mine pull that apron down in that shape (illustrating) and then throws a little lever here, with an iron rod attached to the center of it which runs up here probably two inches above the lower side of the pocket, which holds it back shut. When you throw that lever down it lets the rod down and the pocket will fly open and let coal into the tender. Sometimes the pocket will fall down all right, and all you have to do is to shut the lever; but sometimes there will be some coal up there and you have to get up there and scrape that coal away with your hand.

Q. Up where?

A. Get up here on the apron.

Q. How will you get onto that apron; is that strong enough to hold a man?

A. Yes, sir; there is a breach runs across the bottom of the apron and projects about four inches on each side with plenty of room for a person to put their feet on.

Q. Mr. WALKER: How is it about there being a pin here also?

A. There is a pin which runs right through this brace that that chain is fastened on to.

Q. Where is that brace which runs across and extends out?

A. Do you understand the very words that I say?

Q. Yes.

A. There is a piece of plank four inches wide [that] runs across the bottom of this apron and projects across outside of the apron about four or five inches, and there is a bolt through the end of this plank and this chain is fastened to that, and this chain is fastened to that brace, as you might call it; it braces the apron and holds it together. There is room there for a man to put his foot on, which I have many a time; a short man can't reach the pocket without getting up.

Q. The COURT: What is the necessity of getting up to shut that door; will not the iron rod shut it?

A. No, sir; you have got to shut the pocket before you can fasten it.

71 Q. Can you shut the pocket without getting up onto that apron?

A. Never could; then after you close the pocket throw the apron up.

Q. Where do you go to put that up?

A. Stand right here on the tender.

Q. You can't put that up by standing on the apron?

A. Certainly not, but of course if you stand on the apron you shut this door or pocket. Then you get down and put up this lever—get down on the tender and put up this lever.

Q. How do you put it up?

A. With your hands; raise it about four or five inches or a foot, some of them, and then there is a pin which holds the lever up.

Q. Show us where you would stand to put that apron up. Where would you stand on the tender? Could you stand right in the bottom of that and reach it to put it up?

A. You must get up on the corner of the apron to shut the door.

Mr. WALKER:

Q. To shut that afterwards where did you have to go? After shutting the trap-door where did you go in order to shut this apron?

A. Down on the tender.

Q. What part of the tender?

A. On the tool-box, on the front end of the tender.

Q. State if in these mogul engines there is any tool-box on the back end of them.

The COURT:

Q. Let us get the other. He stands on the tool-box down in the tender and pushes that up?

A. Yes.

Mr. WALKER:

Q. After he has thrown up the apron here what does he have to do—the helper?

A. Providing you have not coal enough——

Q. What further duty has he to do there before you move the engine? What has he got to do?

A. To tell what pocket to go to if they want more coal.

Q. Suppose he has not to get any more, what did he do before you move the engine? What word did you get from him, or did you watch for yourself?

A. I always did watch for myself.

Q. What is the duty of the hostler to do in the way of
72 watching for himself?

(Not answered.)

The COURT:

Q. How much did you put that flap up?

A. That is up as far as it goes. (Referring to model.) It is in the shape that the aprons are.

Mr. WALKER:

Q. Did you lift it just as this is now?
A. Yes, sir.
Q. Did you know the mogul engine No. 212?
A. I did once, when the engine run on the road.
Q. You have seen it?
A. Yes, sir.
Q. Have you ever used it and coaled it?
A. Yes, sir.
Q. As hostler?
A. As hostler, I think.
Q. You may state if you have run that engine under that coal-chute.
A. I run the engine along by the side of the coal-chute.
Q. What, if anything, have you done in the way of trying that engine and its cab under those aprons?
A. I don't understand your question.
Q. What, if any, trial have you made of that mogul engine 212 under those aprons?
A. Well, I did examine the engine and aprons. Any aprons—what aprons I ever saw—they are all alike. I put*ted* the apron down for myself, just to see if a person could get caught in that way.
Q. What did you find to be true?
A. I found that the only way he could be caught that way would be by standing on the corner of the apron; that is the only way that a person could be caught.
Q. What do you say as to that being the way that this trap-door has to be cleared and put down when it don't go shut itself, by his getting up there—whether it is the usual way of shutting it?
A. Yes, sir.

The COURT:

Q. Standing on the corner of the apron?
A. Yes, sir.

Mr. WALKER:

Q. Mr. Brewbaker, you may tell the jury under whose orders the helper or tender is in doing this work?
A. Well, they are under the hostler's orders.
73 Q. State who was the general employer of the men—who controls the general business there at that station?
A. F. J. Gunther.
Q. Who did in 1882 at the time of this injury?
A. F. J. Gunther.
Q. You may tell what, if anything, Mr. Gunther said to you as hostler in regard to reporting to him any of these tenders that didn't obey your orders prior to this injury?
A. Any of these laborers, do you mean?

(Question objected to by defendant by its counsel. Objection overruled; to which defendant, by its counsel, then and there excepted.)

Q. (Question repeated.)
A. He did tell me once if certain men didn't do what I told them to let him know and he would put men there that would.
Q. Who were those certain men?
A. I don't remember who they were.
Q. We don't want their names, but what they were?
A. They were helpers—to give supplies.
Q. State whether that was before or after the injury to Sutherland.
A. I think it was after.
Q. How soon after?
A. I couldn't just tell you; I don't remember.
Q. Give your best recollection.
A. I couldn't tell you exactly, but within two or three months, probably.

(The defendant, by its counsel, asked the court to rule out from the consideration of the jury the conversation related by the witness as having occurred with Gunther, because it occurred after the accident and was not relevant, but improper.)

The COURT:

Q. Did he say anything of this sort before?
A. No, sir.

The COURT: I think it ought to be ruled out.
Mr. DOYLE: Does the court take that from the jury?
The COURT: Yes; you may probably be entitled to that after awhile, in reply, if it is necessary to contradict this witness, but you cannot call it out in chief.

74 (Whereupon the plaintiff, by his counsel, excepted to the striking out of the testimony as above recited.)

Mr. WALKER:

Q. State to the jury if Mr. Lewis, this hostler or engineer in charge of that engine, made any statement to you of how this injury occurred.

(Objected to by defendant, by its counsel. Objection sustained; to which plaintiff, by his counsel, then and there excepted.)

Mr. DOYLE: We propose to show the statement of the defendant, through its agent, of how this thing occurred.
The COURT: We cannot fix the liabilities of the corporation by what he said afterwards.

Cross-examination by Mr. NEWBEGIN:

Q. Are you at work for the railroad company now?
A. I have been—was until last Tuesday night.

Q. Where did you work?

A. At Chicago Junction.

Q. Are you at work for them now—are you still in their employ?

A. Yes, sir; I am.

Q. At Chicago Junction?

A. Yes.

Q. You have no special differences with the company?

A. No.

Q. Nor with its officials?

A. No, sir.

Q. Any grievances?

A. No, sir.

Q. When you said that you were a hostler, you mean that you occupied the same employment that Lewis did?

A. Yes, sir.

Q. Was your work by day or at night?

A. I worked a year at night and then I worked——

Q. When Lewis was working there, was your work there in the day or night?

A. At night.

Q. At the time of this accident?

A. I was off sick on the night that Sutherland was hurt.

Q. Lewis took your place then?

A. Yes, sir.

Q. You have testified about using that mogul engine; how
75 do you know that that was the engine on which Sutherland got hurt?

A. I don't know only what I have been told by the men at the shops at work—what Mr. Moore told me—that it was 212.

Q. You have learned that since the accident?

A. Certainly; the next day or two after the accident.

Q. Who was Moore?

A. A man working with Sutherland, giving supplies and tending the engine.

Q. He was a fellow-laborer with Sutherland?

A. Yes, sir.

Q. That is all you know about it?

A. Yes, sir.

Q. You have said you took that engine out and tested it?

A. No, sir; I didn't take it out; the engine came in from the road. You understand?

Q. You tried it to see whether a man could climb up there or not and get hurt?

A. I tried to satisfy myself how that such could be the case—if I could be hurt in that way. I had heard two different stories, and I examined the engine and the apron.

Q. How long ago was that?

A. Shortly after Mr. Sutherland was hurt; probably three to five days after he was hurt.

Q. Did you try it with the same engine—212?

A. I have.

Q. Was that the time you tried it, shortly after he was hurt, with the same engine?

A. Yes, sir.

Q. Did anybody request you to?

A. No, sir; I tried it for my own satisfaction.

Q. Have you said that before to anybody that you made a test there until you stated it in court here?

A. I did, when I was asked the question. I never told it to anybody in this court-room that is here.

Q. Did you tell it to anybody; did you make it known to anybody that you had done that?

A. I don't think I ever did, only to the person who was
76 with me at the time; he seen for himself, as well as I did.

Q. Who was that?

A. I don't remember who it was.

Q. Was he a stranger?

A. No, sir; he could not have been a stranger if I was working with him. I have worked with a good many different men at that place.

Q. It was one of your own fellow-workmen in the employ of the company?

A. Yes, sir.

Q. As I understood you, you have made tests since that with other engines?

A. Yes, sir; I did.

Q. Where is the tool-box on engine 212 situated on the tender, what portion of the tender, what part of the tender?

A. There was a tool-box on each side of the front end of the tender on the top.

Q. Was there any in the rear end of the tender?

A. I don't remember whether there was on that; there is on some moguls.

Q. I am speaking of the one Sutherland got hurt on.

A. I think there was a large tool-box on the back part of the tender.

Q. There were three tool-boxes then, one on each side and one at the rear end?

A. Yes, sir.

Q. Are you certain of that?

A. Yes; I am quite positive.

Q. Now, is it necessary in order to put up that pocket—that door to the pocket—to hang onto this pin here?

A. It is, for a short man like myself.

Q. Does this model represent the place where the chain is fastened to the apron in that No. 11; isn't it here, further towards the end?

A. That apron represents the apron, and only it is not long enough to show you in what shape it would hang.

Q. You spoke about climbing up onto the brace and holding onto the brace.

A. One foot.

Q. You wouldn't have your foot on the pin then?

A. You would put your foot on the brace and hang to the chain.

77 Q. You wouldn't have your foot on the pin, but on the brace?

A. Yes, sir.

Q. The brace extends clear along here on the bottom?

A. Yes; projects outside.

Q. So if he had been in the brace outside there and hanging onto the chain his leg wouldn't have been caught in here?

A. That is the only way it could have been caught.

Q. If it had been on the brace outside?

A. That is the outside; that is the front.

Q. Is it necessary to hang onto that pin with his foot?

A. Yes; it is.

Q. Instead of onto that brace?

A. There is a brace runs across below, and that brace projects about four or five inches. In order to shut that pocket you have to put your foot on the cross-piece and shut the pocket.

Q. But the pin and the brace are two different things, are they not? Is this chain fastened to the end of the brace?

A. Yes; an iron bolt comes through that brace and is attached to the chain with a bolt.

Q. That brace projects clear down to the end of the apron, does it not?

A. Within about three or four inches of the end.

Q. If the chain is fastened to that, this fastening here, this string representing the chain now, that pin stuck in there is not a proper representation of it?

A. No, sir; this chain, you understand, there is a two-inch plank runs across the bottom of this apron.

Q. How wide?

A. About six inches, and that projects out at both ends about four or five inches, and the bolt goes through this brace that runs across here, and the chain is attached to that bolt.

Q. That bolt goes through which way?

A. This way.

Q. And the chain is fastened to the end of the bolt in here?

A. Yes, sir.

Q. But the bolt comes up through this way?

A. Yes.

78 Q. Instead of the chain being fastened on the outside it is fastened on the inside?

A. Fastened right here.

Q. Then, in hanging on with his foot, he would hang onto the end of that projection of the plank or brace?

A. Yes, sir.

Q. And not on the pin driven into the middle of the apron at all?

A. No, sir.

Q. How many inches did the end of that brace or plank project?

A. About four or five inches each side.

Q. Would there be room for both feet on there?

A. No, sir.

A. And it is not his business to climb up there to shut the pocket until the coal is all out; he had no business up there until after the coal was down, had he?

A. A man wouldn't climb up there, I suppose, until after the coal was down.

Q. He had no business to get up until after he had got the tender filled with coal, or until after the coal was all out of the pocket, had he?

A. No; of course not.

Q. When he did, if he gets up then, where would the engineer be or the hostler?

A. On the engine; inside of the cab.

Q. Attending to the engine—attending to his valves, wouldn't he?

A. He would be waiting.

Q. Naturally be waiting there?

A. Waiting for the signal or to be told where to go to get more coal, provided they wanted it.

Q. And when the workman, the tender, whoever it was, got the pocket up he would tell the engineer, wouldn't he?

A. Yes.

Q. Tell him to go ahead or back up?

A. Yes, sir.

Q. If there wasn't coal enough in that pocket to fill the tender he would go somewhere else?

A. Yes, sir.

Q. And he would have to go to such another pocket as the workman told him to, wouldn't he?

A. Yes, sir.

Q. And [if] he didn't know where the coal was he depended upon these workmen to tell him where it was?

A. Yes, sir.

Q. Do you know how the fact was that night; that one
79 pocket wasn't sufficient to fill the tender, was it, that night?

A. No, sir; it was not.

Q. And he was going to another pocket at the very time of the accident, wasn't he?

A. I wasn't there; I have been told, but I wasn't there.

Q. If the pocket wasn't sufficient to fill the tender the hostler was to go to another pocket, as the workmen directed him?

A. Yes, sir.

Q. It was his business to go where the workmen directed him, as to getting coal?

A. Yes—as to getting coal.

Q. Couldn't Sutherland, when he was hanging on the end of that, have kept his leg up so it wouldn't have struck this other leg?

A. I don't see how he could.

Q. You think it was physically impossible for him to do it?

A. Yes, sir; it would be impossible.

Q. Did you try that?

A. Yes, sir; I did.

Q. At whose suggestion did you make that test?

A. I don't remember who the person was who was working with me at that time.

Q. Did anybody tell you to try it; and, if so, who?

A. No, sir; nobody ever told me to try that; I tried it for my own self.

Q. Tell us, Mr. Brewbaker, just what the business of these workmen is.

A. Their business is to give coal, sand, and water, and knock out the fire and clean the ash-pan.

Q. And they do that as a matter of course?

A. Yes, sir.

Q. You don't have to tell them each time that you want water, "We will go and take water," and each time you want coal, "You must go with me to get coal," and each time to clean out the ash-pan, "Now we will clean out the ash-pan?"

A. I don't have to, because that is their duty.

Q. As a matter of course?

A Yes, sir.

80 Q. It is just as much their duty to do that as it is for you to take charge of the engine and clean it up?

A. Yes, sir.

Q. So when the engine comes in and after it is left by the engineer who has been running it on the road all that you have to do as hostler is to go and take that and see that it is [in] repair, as you have stated; see that it is furnished with water and wood, and then take it back into the round-house, and it is the duty of these two men, or one of them, whichever it may be, to have the coal supplied, to know where they are to get it, and it is their duty to inform you where you are to get this coal?

A. Yes, sir—what pocket.

Q. And they do it? Who fills those pockets?

A. The helpers, the tenders.

Q. It is the very same helpers who have charge of supplying the coal?

A. In the daytime it is, but not at nights.

Q. But it is their business to know where the coal is?

A. Yes—the night men's business to know where it is.

Q. And to inform the hostler?

A. Yes, sir.

Q. It is also their business to get right onto the engine with him and go to get the coal and water, as a matter of course, isn't it?

A. To go right with him; yes.

Q. To go right along with him?

A. Yes, sir.

Q. And that was what Mr. Gunther told you? I understood you to say that the chutes, as they are constructed, the apron projects over about the center of the engine?

A. Yes.

Q. How far distant is it from the sides of the chute—from the middle of the tender—to the edge of the roof of the cab of that 212—how many feet?

A. About three feet.

Q. You have stated that the only way he could break his leg was to be hanging down there. Couldn't it have been broken if he had been sitting on the roof of the cab here, with his leg hanging over there? Wouldn't it have been crushed, too?

81 A. Yes; it would if it had happened to be caught at the right place; it would catch it about here and no other place.

Q. Wouldn't it catch it at the same place?

A. No, sir.

Q. If it had been hanging over at the point where it did catch it, it would have caught it precisely as it was, wouldn't it?

A. I should judge—I never examined that part, but I should judge it couldn't catch a person any other place only just below the knee-joint if they were sitting on the top of the cab.

Q. Do you know as a matter of fact that it did catch him above the knee-joint?

A. I don't know anything about it.

Deposition of James Moore.

Plaintiff, further to maintain the issues on his behalf, called as a witness one James Moore, who, first being duly sworn, testified as follows:

Direct examination by Mr. Walker:

I reside at Chicago Junction, Huron county, Ohio. In January, 1882, I was boarding at Chicago Junction; my home is about a mile and a half out. At that time I was working for the Baltimore and Ohio Railroad Company, helping to tend engine nights, or what is known as a helper; heard of the injury to Sutherland that night; was up on the chute when he got hurt; the chute is a frame work; the top of it is, I should judge, fifteen to twenty feet from the ground; cars run up there and deposit coal to fill the pockets; they dump the coal right from the train; I was up on the chute that night looking for a little more coal; we didn't have coal enough to fill the tender; was looking along for more coal; was looking for a pocket partially filled.

82 Q. What did you hear of the injury; when did you first hear of it, and what did you learn of it?

(Objected to by the defendant, by his counsel.)

Mr. Newbegin: We will concede that he was taken to the round-house and home; we wish to save time; we do not dispute the injury.

Q. Mr. Walker: You were acting there and had acted as a helper?

A. Yes.

Q. Will you state what the duties are of a helper, and who he is to obey? State particularly.

A. Well, he has to help the engine to coal, sand, and water, and clean out the fire.

Q. Will you tell the jury whose orders the helper is bound to obey in the performance of his duty?

A. The hostler.

Q. And you have been there how long?

A. I worked there about three months or a little over.

Q. Previous to the time of this hurt you had worked there about two months?

A. Yes, sir.

Q. Are you in the employ of the company still?

A. No, sir.

Cross-examination by Mr. Newbegin:

Q. Mr. Moore, I understand you to say that your worked for the company about two menths before Sutherland was injured and about one month afterwards; is that it?

A. Yes, sir; that is correct.

Q. And you worked with Sutherland how long as a night helper—that night you were helping Sutherland?

A. About a couple of weeks, I should say.

Q. Then you had been at work with Sutherland from the time he came on that winter until he was hurt?

A. Yes, sir.

Q. All the time?

A. Yes, sir.

Q. During this time had you ever been in the habit of climbing up there to shut the pockets as he did that night?

A. Yes, sir.

Q. You didn't go up by anybody's special order, did you? You weren't told at any particular time to climb up there and shut the pocket?

83 A. No, sir.

Q. You considered [it] your business, as a matter of course, to shut the pockets, didn't you?

A. Yes, sir.

Q. And it was your business to do it without any orders, wasn't it?

A. Yes, sir.

Q. And it was Sutherland's business to shut that pocket without any special orders, wasn't it?

A. Yes, sir.

Q. You were left free, so far as the hostler ordered you, to go up there and shut the pocket in any way you could?

A. Yes, sir.

Q. So far as you know there wasn't any special order given to Sutherland that night by Lewis to get up there and shut that pocket; you didn't hear any order given to him?

A. No, sir.

Q. During all the time that you were at work there do you remember that you were specially ordered to shut the pocket?

A. No, sir.

Q. Nor directed in the manner in which you should shut it by the hostler?

A. No, sir.

Q. You are still living at Chicago Junction?

A. Yes, sir.

Q. You have known Sutherland all this time?

A. Yes, sir.

Q. You are on good terms with him, are you not?

A. Yes, sir.

Q. On good terms with the company, so far as you know, are you not?

A. Yes, sir.

Q. And that night, as I understand you, you were walking along the coal-chute to find a pocket that was partially full or partially empty?

A. I was walking on the top of the coal-chutes.

Q. The chutes are filled with coal from the top?

A. Yes, sir.

Q. It was a part of your duty to tell the hostler where there was coal to fill the tender, was it not?

A. Yes, sir.

Q. And the tender held more than one pocket of coal, didn't it?

A. Yes, sir.

Q. And while they were putting one pocketfull into the tender you had gone off to find enough more coal to fill it, hadn't you?

A. No, sir; we had put the coal in before I went up on the chute.

84 Q. You had put the coal into the engine before you went up onto the chute?

A. Yes, sir.

Q. I understood you to say that he was just closing the door of the pocket of the chute where you had opened when he was hurt, and you were away looking for a pocket that was partly filled; am I wrong?

A. We had dump*ted* that which was in that pocket, and didn't have enough to fill the tender, and I went up on the chute to see where there was more coal. While I was up there he was shutting the pocket up.

Q. He was shutting the pocket up and got hurt while you were up there?

A. Yes, sir.

Q. You were going up there, then, to find more coal to put into the tender when he was hurt?

A. Yes, sir.

Q. You wanted a pocket partly full because a full pocket would more than fill the tender?

A. Yes, sir.

Q. Did the hostler send you up there that night?

A. No, sir.

Q. You went up there because that was a part of your very business?

A. Yes, sir.

Q. That was a part of the workmen's business without any special order; as a matter of course you did that?

A. Yes.

Q. It was your business to tell the hostler where the coal could be taken or else to take it yourself from such chutes as you chose?

A. Yes, sir.

Q. And it was your business to help put it into the engine?

A. Yes, sir.

Q. And to help him about filling the tender with water?

A. Yes, sir.

Q. And to get sand?

A. Yes, sir.

Q. As a matter of course when an engine came in there and was left by the driver — got right onto it and went right along with the hostler in this business?

A. Yes, sir.

Q. The hostler didn't call you specially to go and do it?

85 A. It was our business to go and do it.

Q. And it was his business to handle the engine?

A. Yes, sir.

Q. And that is about all there was to it?

A. About all there was in the work.

Q. You to do your part and he to do his part, wasn't it?

A. Yes, sir.

Q. About how far distant were you from Sutherland at the time of the accident?

A. About twenty-five feet, I should think.

Q. Were you on the same side of the engine with him, or on the opposite side?

A. On that same side.

Q. You were up on the coal-chute; were you towards the head of the engine or back towards the rear of the engine?

A. Back of the engine.

Q. At the end next to the tender then; back?

A. Yes, sir.

Q. How high were you above the tender—how high was the top of the coal-chute, where you were, above the top of the tender?

A. About nine or ten feet, I should say.

Q. Was your back turned towards the engine, or were you looking towards it?

A. I had my back towards the engine.

Q. How long had it been after you left the tender or the engine to go up there before you heard Sutherland cry out?

A. Between three and five minutes, I should think.

Q. Had you heard Sutherland say anything before he cried out that he was hurt?

A. No, sir.

Q. Would you remember it, do you think?

A. Yes, sir.

Q. Was it customary to ring the bell when the engine started there at all?

A. Yes, sir.

Q. Had you heard anything that night?

A. No, sir.

Q. Did Sutherland say anything, to your knowledge, before the engine was started?

A. No, sir.

Q. Didn't you hear him say "all right?"

A. No, sir.

Q. Are you quite sure?

A. Yes, sir.

Q. Will you not give his words again that you heard when he cried out that——

86 A. Mr. Sutherland holl*er*ed to Mr. Lewis, and told him to go ahead; that he had caught him; he holl*er*ed out to him to go ahead that "you have caught me."

Q. When the valves are open, isn't there a sound made by the escape of the steam when the engineer first starts up the engine?

A. There would if the relief-cups were open and the cylinder-cocks.

Q. How were they usually?

A. Just as he had a mind to put them.

Q. Did you hear that noise that night when that engine started?

A. I don't mind hearing it.

Q. You don't remember?

A. No, sir.

Q. You were some twenty-five feet distant?

A. Yes, sir.

Q. You couldn't have heard them, an ordinary signal given to start, could you, with your back turned; you don't think you would have heard it if there had been; I mean if Sutherland had told Lewis in an ordinary tone to go ahead, with your back turned there, you might not have heard it in the position you were in—up above and 25 or 30 feet away?

A. I don't know as I would.

Q. You did use to tell the engineer, when you got through taking coal ordinarily—the hostler?

A. Yes, sir; when we got everything ready we would holl*er* out "all right."

Q. You always used to tell him when you got through and were ready to start?

A. Yes, sir.

(Adjourned to 9 a. m. Friday.)

Friday, 9 a. m.

James Moore recalled for re-examination:

Q. Mr. Walker: You spoke of men going about their work there

—helpers going about their work without receiving any orders; when they first go to that duty, and when they don't understand about their duty, whose duty is it to give them directions?

87 (Objected to by defendant, by its counsel, as having been already gone into.)

The COURT: He has already said that the helpers were under the direction of the hostlers.

Mr. WALKER: Then we don't wish to go any further.

Deposition of Albert Burdge.

Plaintiff, further to maintain the issues on his part, called as a witness one ALBERT BURDGE, who, being first duly sworn, testified as follows:

Direct examination by Mr. WALKER:

I reside at Norridge (Norwitch), in Huron county. In January, 1882, I was in the employ of the Baltimore and Ohio Railroad Company—working on the section then; heard of the injury that Sutherland received there. I was paddying then—putting stones under the ties; took Sutherland's place after he was injured; took it the second night after; Mr. Gunther placed me in that position.

Q. You may tell the jury now what orders you received, and from whom, as to who you should obey?

(Objected to by defendant, by its counsel.)

The COURT: That gets up the old question whether you can show by the company the practice that the superintendent gave these orders, or whether it has not been shown that the superintendent himself gave them.

Mr. DOYLE: We expect to show that it was the custom of the yard to give these orders.

The COURT: I don't think I will rule it out. It may be one way of proving the ordinary way of transacting the business.

(Thereupon the defendant, by its counsel, then and there duly excepted.)

88 Q. Mr. WALKER: You may tell the jury now what, if any, instructions were there given by Mr. Gunther as to whom you were to obey?

A. He said I should obey the hostler. He said he put me there under the hostler's employment and I should obey him.

Q. State if you entered into that employment then.

A. I did.

Q. How long did you continue there?

A. I continued there about 7 months.

Q. Now, generally, under whose orders were the helpers in the performance of their duties?

(Objected to by defendant, by its counsel.)

The COURT: He can tell under whose orders he was.

Mr. WALKER: We ask generally for the custom of the yard.

The COURT: He can tell what he did; if anybody ordered him he can tell it. He says he was directed to obey the hostler, and he staid there seven months.

Mr. WALKER: I will insist on the question, and if the court chooses to rule it out we will except.

The COURT: I rule it out, because it is an abstraction. If you ask who gave him orders I will allow that to be put.

(Thereupon plaintiff, by his counsel, excepted to the ruling.)

Q. Under whose orders were you during that seven months?

A. Well, I was under the hostler.

(Question objected to and withdrawn by plaintiff, by his counsel.)

Q. Mr. NEWBEGIN: You had nothing to do with the coaling of these engine- until after Mr. Sutherland's injury?

A. No, sir.

Deposition of Lotta Sutherland.

Plaintiff, further to maintain the issues in his behalf, called as a witness the wife of plaintiff, LOTTA SUTHERLAND, who, being first duly sworn, testified as follows:

Direct examination by Mr. WALKER:

Q. You are the wife of the plaintiff, are you?

A. Yes, sir.

89 Q. You remember the circumstances, of course, of your husband being brought home hurt?

A. Yes; I never shall forget it.

Q. What time of the day or night was it he was brought home?

A. Between one and two, as near as I can tell.

Q. After his leg was amputated, what can you say about his condition? Describe his condition.

A. Well, he laid so low I wouldn't hardly dare turn my back for fear I would find him dead when I went to the bed again.

Q. How many abscesses were formed?

A. One on the hip and one on the stump.

Q. What did you do, if anything, in their care, if you had anything to do with nursing him and caring for them?

A. Yes, sir; I did.

Q. What was the fact as to there being any abscesses formed on that leg?

A. A person could see all the muscles from his hips down; there was a hole about that large (illustrating with the hands), and it is now drawn down to the bone.

Q. The skin grown to the bone?

A. Yes, sir.

Q. How is it as to his wearing the cork leg; can he wear it continuously or not?

A. He cannot.

Q. At such times have you examined the stump to see as to the irritation or soreness?

A. I have.

Q. How is it about abscesses or inflamed places occurring there or occurring at times?

A. There are hardly two months in a year but it is irritated.

Q. Where?

A. At the end of the stump, and then about three or four times a year he has these abscesses form.

Q. Where are they located?

A. Down on the stump and up on the thigh.

Q. Is it on the outside or the inside of the thigh?

A. Inside of the thigh.

Q. How long do these continue when they form?

A. Well, about a week in all from the time they commence,
90 and it is about four days, when they are very bad, that he
cannot wear the limb at all.

Q. Can't wear the cork leg?

A. No, sir.

Q. How is it now as to being irritated at the end of the stump?

A. It is irritated now and has been for about three months.

Q. Can he wear the cork leg at all now?

A. He can, but it hurts him and has for the last two months; it has hurt him dreadfully to get around.

(No cross-examination.)

John Brewbaker Recalled.

Plaintiff, further to maintain the issues on his behalf, recalled JOHN BREWBAKER, who further testified as follows:

Direct examination by Mr. DOYLE:

Q. You say you saw this engine, No. 212?

A. I have saw the engine.

Q. You stated that it is what is called a mogul engine; I wish you would describe to the jury here as well as you can the construction of that mogul engine, with respect to the location of the lever that opens the throttle and also the method of opening these safety-cups; tell the jury how that is.

A. The boiler of the mogul projects back within about two feet of this end of the cab (towards the tender); there is a door; there is just room on each side of the boiler for a man to pass in here—for the engineer and fireman.

Q. Where is the lever?

A. The reverse lever is right beside of the boiler, upon the inside.

Q. Is there a lever located on top of the boiler?

A. No, sir; the throttle is on top; this is the oil cup; that is the relief cup; it is connected with the cab by a long rod that projects inside of the cab attached to the relief cup, or bolted through the

cup, with a hinge of about four inches long running straight
91 up and down attached to a bolt that goes through the relief
cup, and then a short hinge is attached to this long rod
which the engineer can use to either open or shut the relief cup.

Q. For what purpose are these relief cups opened and shut?

A. To relieve the steam; to relieve the valves.

Q. And suppose the engineer wanted to back up his engine—what would he do?

A. Throw the reverse lever and give it a back motion. He would, of course, shut his relief cups and then proceed to move the engine.

Q. If that relief cup is open, if the hinge is open, in order to move the engine would it be necessary to close it?

A. No, sir; You can move the engine without closing the relief cup.

Q. Is it usual to shut it?

A. Yes; it is proper to shut it.

Q. How is that rod handled by the engineer?

A. By shoving it back and forward.

Q. Have you ever handled the rod in engine 212?

A. I have, sir.

Q. State whether there is any difficulty in handling it.

(Objected to by defendant, by its counsel, as immaterial.)

Mr. Doyle: I propose to show this, if your honor please, that on these mogul engines, and especially this one, this rod which is connected with the safety-cup becomes difficult to manage, and did in that particular instance become difficult to manage, so that the engineer was in the habit of, at the very moment that he took hold of the throttle to move his engine, instead of moving that with his hand—it was very difficult and sometimes required him to get off of the engine and go around and let the hinge down with his hand—that he was in the habit of moving it with his feet; and then I propose to show that at times there was liability, and that there was in fact in this case just that thing done. When the engineer attempted
to move that lever, shutting that safety-cup with his feet, his
92 foot slipped, and the force which the motion gave to his body
made him pull the lever and start the engine.

The Court: There was no defect shown in the machine, and you do not complain in your petition that they furnished a defective machine. I don't know the points you are going to make about it. You propose to show that the machine wouldn't work well, and he couldn't control that rod?

Mr. Doyle: I don't propose to show that he couldn't control it, but it was his business to have that shut before he touched the throttle; I can show it in rebuttal

The Court: I am not inclined to rule it out; I do not see its relation; if you run the risk of letting it go into the record, I do not care.

Q. If a man was standing on that pin or bar that protrudes out there and stood erect, how high would his head be above the trap-door, taking the machine as it was, supposing he stood on that bar and kept both feet above the pin, how far above this would he be?

A. His feet would be below the pocket.

Q. How high above the trap-door would he be?

A. His head would be probably a foot and a half or two feet above the door by standing erect.

Q. The COURT: Could he stoop down and shut the door in that position?

A. No, sir.

Q. Mr. WALKER: Without bending his leg?

A. He couldn't reach the pocket without stooping over.

Q. The COURT: Suppose he had straightened up, with his left foot on that place, and pulled his right leg up as high as the apron, could he have pulled that door up and stepped down again?

(Not answered audibly.)

Q. Mr. DOYLE: If he had put his left foot on that bar or pin could he have cleaned out the bottom of that trap-door without stooping down and bending his leg?

(Objected to by defendant, by his counsel, as leading.)

93 The COURT: That is pretty leading, but let him tell.

Q. Mr. DOYLE: Explain how the door could be shut.

A. I never could shut the door when there was coal under the door without bending over—without putting my foot on the apron and reaching over with my hand.

Q. The COURT: Where would your other leg be?

A. Right beside of the other one.

Q. Mr. WALKER: Would the leg which was not on the pin be above or below the pin?

A. Inside.

Q. If your left foot was on the pin where was that right foot?

A. Inside, between your left and the coal-chute.

Q. His right foot, of course, would be on that side; where would his right leg be if he was bending down and forward so as to clean out this bottom?

A. His right leg would be in front.

Q. Mr. NEWBEGIN: Show us—go through the pantomime.

A. Well, suppose this is the coal-chute; a piece of plank runs across the bottom of the apron about four inches wide perhaps, and projects on each side of the apron about four or five inches. This pocket has some coal in under; I want to shut that pocket; I want to get that coal out and shut that pocket in order to put up this lever to fasten the pocket, so that when coal is put in there again that it will not run out on the ground. Well, I have got to put my left — up. This man, Mr. Sutherland, also put his left foot on the outside, if he was on this side; then he would reach up and get the coal out from under that and shut the pocket. Of course, when he had his left foot on this brace across here right over that way his right leg would hang between the left foot and the coal-chute; or, if he was on the other side, it would be just the opposite.

Q. The COURT: Then, if he straightened up, where would his head be with reference to that little gate?

A. When he stands erect it would be above the bottom of 94 the door, I should judge; but still, at the same time, this apron is a long apron; you can't reach that pocket unless you bend over forward and take hold of this weighted chain.

Q. The point where this man had his left leg was either above or below of that thing which came back?

A. The pin was below the cab.

Q. The slope of the apron brought it below?

A. Yes.

Q. And his right leg would be just where his left leg was if he straightened up?

A. Yes.

Q. Mr. DOYLE: Put you left foot on the chair here and bend it right forward.

Q. The COURT: The gate is that upper hole in the chair, and you are going to shut that up.

A. Here I am standing straight and I want to bend over to reach that distance——

Q. Now, then, reach over.

(Witness does so.)

Cross-examination by Mr. SCRIBNER:

Q. I notice there are side pieces on the apron; about how high are the side pieces at the chute outside; what is their height?

A. About ten inches.

Q. What is their thickness?

A. One and a half inches.

Q. In closing this door did the men sometimes get up onto the apron, holding to the chain, and then get down?

A. Sometimes; yes.

Q. It can be done in that way, can it?

A. Yes, sir.

Q. I understood you to say something about closing some escape here; what do you call it?

A. The relief cup.

Q. It is not necessary to close that in order to move the engine either way, is it?

A. Well, it is the proper way to move the engine.

Q. It is not necessary to do it?

A. You can move the engine without shutting them up.

Q. It is the commonest thing in the world to see an engine running up and down with the steam-cocks open?

A. Not the relief cups.

Q. What is the difference between what you call the relief 95 cups and the cylinder cocks?

A. The cylinder cocks are attached to the cylinder and the relief cocks are attached to the steam-chest.

Q. Does that make any difference in the matter of moving the engine, as to the propriety or necessity of closing them, whether they are attached to the cylinder or whether they are attached to the steam-chest?

A. I don't understand.

Q. Does it make any difference, as to the propriety or necessity of closing the escape, whether it is attached to the steam-chest or attached to the cylinder?

A. No, sir.

Q. It makes no difference at all?

A. No, sir.

Q. So that there would be the same reason for closing the cylinder cocks as there would be for closing the cylinder cups?

A. They would work on the same principle, only one is on the steam-chest and the other in the cylinder.

Q. Did you ever run an engine on the road?

A. Never did.

Q. The only work you did at that was in handling the engines in the yard?

A. After the engineer brought them in.

Q. Brought them into the yard to be coaled and fixed up and put into the round-house?

A. Yes, sir.

Q. When did you examine 212?

A. I don't remember exactly when it was; but it was a short time after Mr. Sutherland was hurt.

Q. Are you certain that the boiler of that engine didn't come clear back to the end of the cab?

A. The boiler on a mogul comes back within two feet of the back.

Q. You think that is as far back as it comes?

A. I should judge about that distance—probably two and a half, it may be.

Q. In moving an engine in the yard, after she has come in under these circumstances, is it necessary to open the throttle to give her steam, or ordinarily is there sufficient steam already in the cylinders and pipes to move her?

A. It is necessary to open her throttle in order to move the engine.

Q. Do you always, when the engine is brought in, open the
96 throttle in order to move her?

A. Yes, sir.

Q. Don't you sometimes move her by simply using your lever?

A. Sometimes; in case of handling the engine a short distance after you have been moving the engine.

Q. After the engine has been moved, and is immediately taken in hand, she can be moved again without giving her steam at the throttle?

A. No, sir; it could not.

Q. Are you sure of that?

A. Yes, sir.

Q. Where the steam-cocks are open, if the engine moves you hear the escaping of the steam at every revolution of the wheel, don't you?

A. Yes, sir.

Q. I think you were enquired of about the tool-chest in this 212. Will you repeat what you said on the subject, if you please?

A. The tool-chests are on each side of the tender.

Q. In front or rear?

A. In front, on top of the tender.

Q. Did I understand you to say that there was a third one?

A. The third one projected crosswise at the back.

Q. On the rear of the tender?

A. Right next to the rear, just outside of it.

Q. Does it go clear across the tender?

A. Yes, sir.

Q. These two chests in front, about what is their size?

A. They are about 3 feet long, 2 feet wide, and about 18 inches high.

Q. Three feet long, two feet wide, and about 18 inches in height. Can you tell us about how high the top of the cab was above the top of the tool-chest—in other words, about what was the top of the cab from the floor on which the tool-chest rested? You say the tool-chest was 18 inches high.

A. Well, I should judge that the tool-box was about 18 inches below the top of the cab.

Q. So that the floor of the tender on which the tool-box rested would be about three feet below the top of the cab, in your judgment?

A. Yes, sir.

97 Q. Mr. Newbegin: You have examined this model since you testified yesterday?

A. Not until just now.

(Thereupon the plaintiff rested.)

Testimony on Behalf of the Defense.

Defendant, to maintain the issues on its behalf, called as a witness William Sutherland, the plaintiff, who, having been previously sworn, testified as follows:

Deposition of Wm. Sutherland.

Direct examination by Mr. Newbegin:

Q. Was this the only paper which you ever signed, this application to the Relief Association?

A. No, sir; I signed another one.

Q. When was that?

A. In 1882.

Q. You may state if it was similar to this?

(Objected to and not insisted on.)

Witness: I signed that paper in 1881.

Deposition of Peter George.

Defendant, further to maintain the issues on its behalf, called as a witness one PETER GEORGE, who, being first duly sworn, testified as follows:

Direct examination by Mr. NEWBEGIN:

I reside in New Baltimore, Wood county, Ohio; have been working for the Baltimore and Ohio R. R. Co. for the last six months; am not working for it now; left their employ last spring; knew of this accident to Mr. Sutherland in 1882; I was firing then on 98 engine 212; running on the road as fireman; the engineer was Andy Hubler; couldn't say whether he is now in the employ of the company; couldn't say just what time I got in on the night of the injury; I have forgot what run I was on or what the run was; we run east and west; don't remember the run we had come in on; remember the accident to Sutherland; saw him before, at the time, and after he was hurt.

Q. Tell the jury what you know about that accident.

A. The engine was standing on the south side of the coal-chutes, headed east, and he was on one side of the tank and stood upon the tool-box, and the apron was down, and he told Mr. Lewis to back up.

Q. State whether or not the engine backed in response to his request?

A. Yes, sir; it did.

Q. What was the result?

A. Why he got caught between the apron and the cab.

The COURT: Let him repeat so that the jurors can hear him.

Q. Mr. NEWBEGIN: Repeat what you said about the accident, so that the jurors can all hear; you begin with the time that you saw him standing on the tool-box.

A. Well, the engine was a consolidated engine—it extended clean to the cab, and the cab was set forward on it, and I was on the left side right in front of him, and was standing looking at him, and had taken my over suit off, or was about to, and he was standing on the tool-box, and the apron was down, and he told him to back up, and he got caught there. I saw it.

Q. Told who to back up?

A. Told Mr. Lewis.

Q. State whether or not Lewis did back up in response to his request?

A. Yes, sir; he did.

Q. How far was the engine backed up before Sutherland was caught?

99 A. Probably two feet—somewheres along there—may be a little more.

Q. The COURT: What took place then—what was said by anybody?

Q. Mr. NEWBEGIN: State, after Sutherland called to Lewis to back up—repeat what took place?

A. He got caught.

Q. When he got caught was there anything said?

A. Yes, he told him to go ahead.

Q. Who did?

A. Why, Mr. —; I can't think of his name.

Q. This man here (pointing to plaintiff)?

A. Yes, sir; he told Mr. Lewis to go ahead.

Q. Did he say anything else?

A. He might have; I don't know; he holl*er*ed and told him to go ahead.

Q. Did Lewis go ahead?

A. Yes.

Q. That would relieve the leg and loosen him; was that the idea?

A. Yes, sir.

Q. State where you were standing definitely?

A. I was standing on the left side of the engine.

Q. And on which side from the coal-chute?

A. On the same side.

Q. Were you standing on the ground, or where?

A. I was on the engine.

Q. What part of the engine were you standing on?

A. On the left side—in the gangway.

Q. The space between the tender and the ——?

A. Between the outside of the cab and the boiler.

Q. Were you on the left side next to Sutherland, or on the opposite side from Sutherland?

A. On the side next to Sutherland.

Q. Tell whether you looking at this time towards Sutherland or not.

A. Yes, I was looking right at him.

Q. Which way was his face?

A. His face was west.

Q. Towards or from you?

A. His back was towards me.

Q. How far distant was Sutherland from you at this time?

A. Probably about six feet.

Q. Had you been there on that engine from the time it came in until Sutherland came there to help take coal?

A. Yes.

Q. What had become of the engineer, Hubler?

100 A. He had got off and went into the round-house.

Q. Who, if anybody, took his place to run the engine—that is, there in the yard?

A. Mr. Lewis took it.

Q. Who was Mr. Lewis?

A. The hostler.

Q. Now, at the very time that Sutherland was hurt, where was Mr. Lewis?

A. He was on the right side, handling the engine.

Q. Which side was it his business to be when he was moving the engine?

A. On the right side.

Q. Now, tell the jury, if you know, how many tool-boxes were on that tender—that was a mogul engine?

A. Yes, sir.

Q. Then tell the jury how many tool-boxes there were and where they were situated?

A. There was two on—one at each side of the front; I will not be sure whether there was a third or not; I only fired on that engine that trip.

Q. Did you see for yourself where Sutherland got caught?

A. Yes, sir.

Q. What place on his leg was it and which leg? State on your own leg about where the engine caught him.

A. Why, it caught him up along here some place on the leg.

Q. How near to the knee was it?

A. I didn't look at his leg much.

Q. As you saw him caught there, about how near his knee was it?

A. Below his knee here—pretty close, probably four or five inches, maybe more, below the knee.

Q. Did you see the catching of the leg—have any effect on it—did it move his leg, twist it, or otherwise, in any direction?

A. It was done so quick that I didn't notice whether there was any twist to it or not.

Q. State whether, immediately on the call of Sutherland to go ahead, the engineer responded—how soon afterwards.

A. Yes, sir; right away.

Q. What was the result—did the engine move ahead or not?

A. Yes, it went ahead.

Q. What became of Sutherland then?

101 A. He kind o' fell down on the coal in the tender.

Q. Were you one who helped to take him up and take him away?

A. I was there. I will not not be positive whether I helped to take him in or not. I don't think I did. I think I staid there.

Q. Do you know who did?

A. No, I do not; I couldn't say.

Cross-examination by Mr. DOYLE:

Q. What is your business now, Mr. George?

A. I have been husking corn this fall.

Q. What business have you been in since you left the Baltimore and Ohio Railroad Company?

A. Well, I have not been doing much of anything until this fall.

Q. What are you doing now—what is your business now—what are you engaged at? You understand the question, don't you?

A. No, sir.

Q. I say, what are you doing to earn a living now—what are you at?

A. I ain't been doing anything since corn-husking is over.

Q. Nor before corn-husking?

A. I husked corn this fall.

Q. That is all the business you have done since you left the railroad?

A. I have done some other work, too.

Q. What other work?

A. Got out some staves.

Q. You say you live at New Baltimore?

A. Yes, sir.

Q. How long have you lived there?

A. Well, I call that my home. I have been there off and on and near there for about fifteen years.

Q. You are the witness about whom we have had so much trouble here in this case, are you not?

A. I guess I am.

Q. You were served with a subpœna in this case by the marshal at New Baltimore before the trial?

A. By the marshal?

Q. By some officer; you were served with a subpœna, were you not?

A. Yes.

Q. Did you come to Toledo?

A. No; I came as far as Bowling Green.

Q. What did you do?

A. I didn't feel very well and I got off there.

102 Q. Did you tell the marshal you were going to get off?

A. No.

Q. And the next day you had an attachment issued for you, didn't you, Mr. George?

A. There was a man there.

Q. The man came after you the next day?

A. Yes.

Q. He brought you down here, didn't he?

A. Yes.

Q. Why didn't you come here the next morning—yesterday morning?

A. I did start out and I couldn't find; I walked around and enquired of two or three, and they told me out this way, and I kind o' got off from the track.

Q. You paid your bill at the hotel, however, the night before?

A. Yes.

Q And left the hotel before breakfast?

A. No, sir; I eat my breakfast there.

Q. About what time?

A. I don't know just what time.

Q. Haven't you any recollection about it?

A. It might have been about seven o'clock—along there.

Q. Where were you going from there? You left some directions from the clerk. You didn't intend to come back to that hotel, did you?

A. Why, I started out from there, and I don't know which way I did go. I was turned around.

Q. Where did you start for?

A. I started to come up here.

Q. And didn't find the place?

A. No, sir.

Q. Did you have a conversation with anybody about this case that night—that evening; the evening before?

A. I believe not.

Q. Are you sure of that?

A. I think not.

Q. Do you know that detective of the Baltimore and Ohio R. R. Company who has been here sitting alongside of Mr. Newbegin—Mr. Rankin?

A. I ain't acquainted with him.

Q. Do you know him by sight?

A. If that is the man, I know him now.

Q. Did you see him that evening—the evening of night before last?

A. Not that I remember of.

Q. Did you see him yesterday morning to have any talk with him?

A. I seen him some place, and I don't mind——

103 Q. Now, Mr. George, you can remember and tell this jury what occurred three years ago, but you can't tell the jury whether you saw Mr. Rankin yesterday or the night before, or when you saw him and what was said—do you mean to say that?

(Not answered.)

Q. Come, tell us what you said to him, and what he said to you?

A. I didn't know him.

Q. That is not answering the question; did you have any talk with him?

A. Well, I don't know; I might have talked with him and didn't know it.

Q. How long had you been in the employ of the Baltimore and Ohio Railroad Company when this accident happened in January, 1882?

A. I had worked there two or thee years, I guess, off and on.

Q. Had you ever fired on this engine before?

A. I might have fired her a trip or two when I was firing extras; I remember I fired her once before, I think.

Q. Didn't you just say you only fired that engine that one trip?

A. Well, at the time.

Q. What time; you couldn't have fired it more than once at once. Didn't you say a while ago that you never fired that engine but that one time—didn't you say that a minute ago in answer to Mr. Newbegin?

(No answer.)

Q. The COURT: Answer it if you can remember; answer what your recollection is about it.

A. Why——

Q. Mr. DOYLE: What is your recollection now about whether you ever did fire her more than one time?

A. I might have fired her three trips in all.

Q. The COURT: Did you fire her at any other time?

A. Why, I did, I guess, one or two trips.

Q. Mr. DOYLE: Was that before the accident or since?

A. It was before.

104 Q. You never fired that engine afterwards, did you?

A. No, sir.

Q. You don't remember whether there was three tool-boxes on that engine or not?

A. No, sir.

Q. You don't remember what time you got in that night?

A. No.

Q. You don't remember whether you came from the East or the West?

A. We came from the West.

Q. But you don't remember what run you were on?

A. No.

Q. You don't remember whether you were one of the men who helped Sutherland in from that coal pocket?

A. No.

Q. You don't remember who did help him in?

A. No.

Q. Where did you go after the accident that night?

A. Why, I went into the round-house, I believe, first.

Q. How long after the accident was that?

A. How long after?

Q. Yes.

A. After the accident had happened do you mean?

Q. Yes; how long after that did you go to the round-house?

A. Well, I couldn't say; I wouldn't be positive.

Q. Did you go to the round-house on the engine?

A. No, sir.

Q. Where did you get off from the engine?

A. I got off there at the coal-chutes.

Q. Where did Lewis go?

A. I don't know anything about him.

Q. You left him there, did you?

A. Yes.

Q. Now you say that there was a tool-box on each side of the tender in front?

A. Yes, sir.

Q. How far back did they extend from the front of the tender?

A. Probably they were three feet long.

Q. How wide?

A. Maybe 18 inches, along there somewhere.

Q. How high?

A. I don't know exactly how high; I never measured them.

Q. How high was the top of the cab from the top of the tool-box?

A. Well, probably about 2 feet, or nearly that.

Q. I understood you to say that Mr. Sutherland was standing on the tool-box?

A. Yes; stood on the tool-box.

105 Q. When he was caught?

A. Yes.

Q. You are sure of that?

A. Yes.

Q. And the engine backed up and caught him?

A. Yes.

Q. And the apron was down?

A. Yes.

Q. Explain to the jury how that could happen without catching both of [his] legs if he was standing on the tool-box and the apron was down. I want you to explain to the jury.

(Objected to.)

A. WITNESS: I can't explain it.

Mr. NEWBEGIN: I object to the whole manner of examining the witness.

The COURT: I can't control the lawyers' manners very well, except to make them behave themselves.

Mr. NEWBEGIN: I don't think he has a right to refer to the model and not permit the witness to go to the model.

The COURT: I think he has a right to that.

(Thereupon defendant, by its counsel, excepted.)

Q. Mr. DOYLE: Will you explain to this jury how it is that he could have stood on that tool-box with the apron down and the engine coming back so as to catch him between the top of the cab and the apron without catching both of his legs?

(Witness goes to the model.)

A. Here is the tool-box under here; this apron extends higher than that; it reaches down in there; he stood in here, and he told him to back up and he backed up, and his leg got caught there.

Q. How did it do that without catching both legs?

A. There is an angle there; you can't catch a man's both legs there.

Q. The top of the cab caught his leg?

A. Yes; and there *two*.

Q. How could he come up—with the apron extending to the middle of the cab—without catching both legs?

A. There ain't room enough there to catch two legs.

Q. When the right leg was caught where was the left leg?

A. Outside; a man couldn't catch his two legs there.

106 Q. Why?

A. Because this chute angles down there, and the cab is perpendicular here, and you can't get but one leg in here—you can't get two in at a time.

Q. When that cab comes back against the apron —, is down, how can it crush one leg without crushing the other; he is standing on the tool-box and the apron comes clear across to the center of the cab?

A. There is no room; I can't see how it could catch both.

Q. Do you recollect these side pieces on this chute?

A. Yes, sir.

Q. How high are they?

A. I can't say; they are not high.

Q. About a foot or ten inches?

A. Not that high.

Q. How high?

A. Probably six or eight inches along there.

Q. And they extend clear out to the edge here?

A. I don't think they do extend clear out.

Q. Out beyond this bar which runs along?

A. Yes.

Q. And the chute or apron comes about to the center of the cab when the coal is dumped?

A. Pretty near, I guess.

Q. Where were you standing at the time this thing occurred—come and indicate? Now, the chute is on this side, say.

A. Yes; I stood right in there; the boiler extends through.

Q. Perpendicular to the rear of the cab, don't it?

A. Yes.

Q. And you were in here between the windows and the boiler?

A. Yes.

Q. Which way were you looking?

A. I was standing——

Q. With your back in front and facing south?

A. Yes.

Q. Sutherland was standing on the tool-box?

A. Yes.

Q. What did he say?

A. He told the engineer to back up.

Q. Give me his words. What did he say? Give his words just as you heard them—just as they struck your ear—just as they are impressed on your memory.

A. He told Mr. Lewis——

Q. Give me his words.

A. He said "Back up."

Q. Those are the exact words, are they?

A. Yes.

Q. How loud did he say that?

107 A. About so we could hear them; he backed up and he got caught.

Q. Where was Mr. Sutherland when he said "Back up?"

A. On the tool-box, on the left side.

Q. How quickly did the engine back up?

A. Why, he started back and he got caught.

Q. I know that; but how quickly did the engine back up—at what speed?

A. I don't know.

Q. Did you see Sutherland when he was standing on the tool-box?

A. Yes.

Q. And you saw that the apron was down?

A. Yes.

Q. Didn't you imagine that he would get caught if the engine backed up?

A. I didn't think; I didn't suppose maybe he would back quite far enough to catch him.

Q. Did you suppose that he was going to back less than two feet?

A. I didn't know; it wasn't my business.

Q. You saw that the apron was down, you say?

A. Yes; and he had it down.

Q. Did he have hold of the apron when he said "Back up?"

A. I don't recollect whether he had hold of it or not.

Q. Which way was Sutherland looking?

A. I didn't look at him.

Q. Which way was Sutherland's face; was he facing you?

A. His back was to me.

Q. What was he doing?

A. Standing on the tool-box.

Q. Straight up?

A. I think he was standing straight.

Q. Where was his lantern?

A. I won't be positive whether he had it on his arm or whether he set it up; the lantern was lying there.

Q. You say to this jury that Sutherland, standing straight upon that tool-box, with that apron down, which he had put down, and without putting it up, gave the engineer orders to back up on him; do you say that?

A. Yes, sir.

Q. You didn't apprehend any danger from it?

A. I thought he wanted to back up a little.

Q. There was not more than two feet between the cab and
108 the apron?

A. It might have been.

Q. You say you saw that the apron was down?

A. I do, sir.

Q. You were looking out through the back of the cab right towards him?

A. I was.

Q. You saw that the apron was down?

A. Yes.

Q. And that he was standing upright on the tool-box?

A. Yes, sir.

Q. And he ordered him to back up?

A. Yes.

Q. And you didn't think there was any danger in that kind of a performance?

A. I didn't know how far he wanted him to back.

Q. He didn't tell him to back up just a little, did he?

A. No, sir.

Q. Could the engineer back that engine and stop it in less than two feet?

A. He could, I suppose.

Q. You didn't near any order to stop until Sutherland was caught, did you?

A. Why, no, sir.

Q. None at all?

A. No, sir; not until he was caught.

Q. Your name is Peter George?

A. Yes, sir.

Q. Have you ever had any other name but that; have you ever gone under any other name than that?

The Court: I don't know that that makes any difference.

Mr. Doyle: I want to know something about this man.

The Court: We haven't time to go into his general history.

Mr. Newbegin: If it is for the purpose of impeachment, his question is not definite enough.

Q. Mr. Doyle: Did you ever pass under any other name, or give any other name, or travel under any other name?

(Objected to by defendant, by its counsel.)

The Court: (To witness:) You may answer that or let it alone.

Mr. Doyle: Do you want to answer that question?

(No answer.)

The Court: Tell us whether you want to answer it or not.

A. I don't care about answering it.

Mr. Newbegin: When that order was given to back up,
109 did Sutherland give any distance that he was to back up?

The Court: He has said that he didn't.

Witness: No, sir.

Deposition of E. H. Young, Jr.

Defendant, further to maintain the issues on its behalf, called as a witness one E. H. Young, Jr., M.D., who, being first duly sworn, testified as follows:

Direct examination by Mr. Newbegin:

Know Sutherland, the plaintiff here; am a practicing physician and surgeon; reside at Chicago Junction, Ohio; resided there on the 30th January, 1882; was then a physician and surgeon; knew of this accident to Sutherland by being called about between one and two o'clock on the morning of the 31st day of January, 1882; was called to attend Sutherland; he was at his home.

Q. Did you find him there injured?

A. Well, I overtook him; I got up and dressed myself and overtook him before he got there, and helped him into the house; he gave me the key to unlock the door, and, being his family physician, he asked me to wake his wife; I went upstairs and woke his wife up,

Q. Were you at the time surgeon of the Railroad Relief Association?

A. No, sir; the Railroad Relief Association hadn't any surgeon there only as we accepted their fee-bill.

Q. As you were called for each specific case?

A. Yes, sir; When each man that was injured——

Q. I don't care to go into that; I merely wanted to know if you were their regular surgeon at that time?

A. Every man had his individual choice.

Q. At whose request were you called?

A. I couldn't state that.

110 Q. How did it turn out afterwards?

(Objected to.)

Q. Did you continue to treat him afterwards?

A. Yes.

Q. At whose request did you treat him?

A. At his own.

Q. Now state how you found him injured, if at all.

A. Well, when I—if the judge please, have I the privilege of referring to notes in my pocket-book?

The Court: Describe it generally.

A. When I was called and went to his house I found him with his right leg enormously swool-en, and, on making an examination, I diagnosed an injury of the large bone of the lower limb—the tibia—and the immense swelling, of course, it was having to account for that; the only way would be that there was some effusion of liquid into the tissues of the limb.

Q. Tell about the fracture of the bone.

A. The lower bone of the limb—the large bone of the lower limb—was broken in three parts.

Q. How about the knee?

A. That extended into the knee-joint itself.

Q. Was the knee crushed?

A. No; the knee-joint itself; it was fractured into the knee-joint.

Q. Any fracture above the knee?

A. No, sir.

Q. Any fracture of the femur?

A. No, sir.

Q. No injury above the knee?

A. No, sir.

Q. Were you present at the amputation?

A. Yes, sir.

Q. Well, of course, it was necessary to amputate the leg?

A. Absolutely necessary.

Q. The injury was of such a nature?

A. Yes, sir.

Q. It was amputated above the knee?

A. Yes, sir.

Q. How far above?

A. Between six and eight inches above the knee.

Q. What surgeons determined where it should be taken off?

A. There was Spooner, of Republic, Ohio, and Dr. Cling, of Plymouth, at that time; they performed the amputation and I administered the chloroform.

111 Q. What surgeons agreed upon the place or concluded the necessity of taking it off at any particular place?

A. All three of us.

Q. It was the conclusion of each of you that it was necessary to amputate it where it was amputated?

A. Yes, sir; that it was absolutely necessary to amputate it above the knee.

Q. Did you have any talk at that time or during that term? How long did you treat Sutherland for that injury?

A. Well, I was called there on that occasion between one and two o'clock of the 31st day of January, and I treated him up to April the 16th, 1883.

Q. Were there any other surgeons attending him during that time?

A. I had occasionally to go to Castalia, in Erie county, and I had Dr. Kling, of Plymouth, come down twice or three times to dress the limb for me while I was away; I had to go away in the night, and Dr. Spooner came down at different periods to see the case.

Q. Do you know how long Dr. Spooner saw him?

A. During the whole continuance of the case Dr. Spooner had some say about the management of the case; he was consulted all the time.

Q. What relation, if any, did Dr. Spooner bear to the railroad company at that time?

(Objected to by plaintiff, by his counsel.)

Q. During the time that you were treating Sutherland what statements, if any, did he make to you as to how he got his injury?

A. Well, as a natural consequence——

Q. The COURT: When did he make the first statement?

A. Well, on the morning after he was injured and at some time after.

Q. Mr. NEWBEGIN: What did he say?

A. Of course, to make a correct diagnosis of the injury, I asked him how he got hurt. He says: "I can't tell just now; it was an accident, and I was caught at the coal-chutes, between the cab

112 and the apron," and he says it was an accident. I says: "Can you tell me how you was caught?" and he says: "I don't know."

Q. Did he make any other statement to you at any other time?

A. He didn't just at that time.

Q. If it was at any time?

A. Well, after I had staid with him a part of a night, then, on closer inquiry, he explained, or tried to explain, how he was caught. As close as I could get at it he explained just how he was caught.

Q. Tell his words as near as you can remember them.

A. Well, he said he was caught between the top of the cab and the apron of the coal-chute.

Q. What, if anything, did he say about whose fault it was?

A. He didn't say; he said it was an accident, and there was nobody to blame; I don't know as that was the express words that he said.

Q. What condition was he in at that time, as to his sensibility, so as to understand what he was talking about?

A. He was perfectly conscious and not suffering from the shock, as railroad men usually are; he was very cool and collected, so that he understood all that he was saying, I thought, in that respect; he was not suffering from the shock, as men generally are who suffer serious railroad accidents.

Q. Did he say anything abount his lantern and where it was?

A. I think he told me that his lantern was on the top of the cab; he told me that the lantern was on the top of the cab.

Q. Did he say where he was at the time of the injury?

A. He didn't tell me right at that—at the immediate—time.

Q. I mean any time.

A. Well, he explained to me in the morning how he was injured; you will understand it was necessary; I asked him these questions to understand how the force was applied to fracture the bones in the manner in which they were fractured; he said they were caught between the edge of the cab and the apron.

113 Q. Now, did he tell you anything as to now his leg came to be between the edge of the cab and the apron?

A. From what he told me——

Q. No, not that.

A. I understood him to say that he was sitting with one foot on the box, and sitting on the top of the cab, and the lantern was back of him, and his knee was caught between the apron and the edge of the cab.

Q. How long after the injury was that statement made?

A. Well, it was within twelve hours.

Q. Did you have a talk with him, then, about ten days after his injury?

A. Well, I had a continuous talk with him, because I took care of him all the time after he was injured until he got out on crutches.

Q. What, if anything, did he say some ten or twelve days after his injury about where he was when he got hurt?

A. I can't remember the day that he said anything about it.

Q. After this first time, then, did he state to you at any time where he was when he got hurt?

A. I didn't say anything to him, and he was more reticent about saying anything to me within a week after he was injured.

Q. What he did say then about this matter as to how he got injured and where he was when he got injured was stated within the first week?

A. Yes, sir.

Cross-examination by Mr. Walker:

Q. How long had you been in practice there at Chicago Junction?

A. I moved to Chicago Junction in April, 1877.

Q. You have practiced there continuously from April, 1877, up to the time of this injury?

A. Yes, sir.

Q. When you went to that patient it was in the night?

A. Yes, sir.

Q. His leg was crushed?

A. Yes, sir.

Q. Crushed into the knee, was it?

A. The tibia—the head of the tibia—was fractured into the knee.

Q. This main bone leading down from the knee to the ankle?

A. Yes, sir.

Q. Is there any other bone there?

A. Yes, sir.

114 Q. What is that called?

A. The fibula.

Q. The head of the tibia you say was fractured?

A. Well, that bone was fractured into the knee-joint.

Q. How was it, then, about the cartiliges about that knee-joint being fractured necessarily?

A. Well, of course that bone couldn't very well be fractured without some disturbance of the cartiliges and of the ligaments.

Q. And that utterly ruined the knee-joint?

A. It would have to be.

Q. Were there any openings into the knee from the outside?

A. No, sir.

Q. When the amputation occurred you used the chloroform?

A. Yes, sir.

Q. They—two surgeons—did the work of amputating the leg?

A. Yes.

Q. Did you examine the bone above the knee after the amputation?

A. I did; I took the scalpel and laid it all open.

Q. Who were present?

A. Well, Dr. Spooner and Dr. Kling and a man by the name of Watson Lindsey, who is now dead.

Q. Dr. Spooner was present?

A. Yes, sir.

Q. Did he lay open the leg?

A. Yes.

Q. And they were observing you?

A. Yes, sir.

Q. Was there any injury to the femur and the upper bone?

A. No, sir.

Q. No contusions above the knee and no injury to the bone?

A. No, sir.

Q. You had a conversation with this man when he was brought home?

A. After we got into the house.

Q. How soon after you got into the house?

A. Oh, between two o'clock and daylight, at that time of the year.

Q. Did you immediately as soon as you got into the house?

A. No, sir; as quick as I got into the house he told me where his wife was sleeping and I knocked at the door. I put my hands in his pocket and got the key out of his pocket.

Q. After you got into the house you had a conversation with him, and you went upstairs and called his wife immediately and had a conversation with him immediately after you returned to him?

115 A. When I was making the examination I asked him how he got injured.

Q. On that occasion he told you he didn't know and couldn't tell you how?

A. Yes.

Q. He was perfectly conscious?

A. Yes, sir.

Q. These bones were crushed to pieces?

A. Yes, sir.

Q. Broken in three places?

A. Yes, sir.

Q. Were those bones split lengthwise?

A. The head of the tibia was broken in three parts, and there is a V-shaped projection; the lower part of the tibia was split up into the space above the knee, so that the head of the tibia made a "V" of the fracture.

Q. It was split lengthwise in that particular?

A. Within the space of the knee.

Q. As to the lower bones below that, how were they about being horisontally broken and then split lengthwise?

A. There was no fracture upward immediately connected with the knee-joint; the other bones were broken off nearly horizontally.

Q. Both bones were broken?

A. No; not both; both were not broken; the fibula was simply thrown out of its socket; it was just broken through the articulation of the fibula and tibia.

Q. You had a conversation with him that morning?

A. Yes.

Q. How many persons were there present who helped to move him in?

A. Three or four, I think; I can't remember their names.

Q. At that time you were intent on taking care of that leg?

A. Yes, sir.

Q. That was your object in making any inquiry about it?

A. A natural inquiry to know how the force was applied to make the fracture.

Q. Was that a natural inquiry, or was it that the circumstances required it?

A. It was a natural inquiry from any man who wants to know how the force was applied in making a fracture.

Q. The object of your inquiry was to ascertain what the extent of the injury was?

A. Yes, sir.

Q. And nothing else?

A. No, sir.

116 Q. You wasn't trying to find out who was to blame to exculpate the company?

A. No, sir.

Q. Nothing; only to know how the injury occurred?

A. How the force was applied to that particular bone; that was all.

Q. Who was present?

A. I couldn't say that.

Q. Was Mrs. Sutherland present?

A. I think she was; I wouldn't be positive about it.

Q. But you think she was.

A. I think she was, and I think there was one or two others in the room; I wouldn't be positive about anything of that kind; only that I asked——

Q. Have you a father or brother who is in the practice of law?

A. Yes, sir.

Q. Where?

A. At Norwalk.

Q. Had you on any of those occasions proposed to Mr. Sutherland in the presence of his wife that he should place that case in the hands of your father and brother?

A. No, sir; I did not.

Q. Did you on that occasion or on any of these occasions suggest and say to him—say to Mr. Sutherland—that he had a perfectly good case against the railroad company, and request him to place it in the hands of your father and brother as attorneys?

(Objected to and not answered.)

Deposition of Wm. Bramley.

Defendant, further to maintain the issues on its behalf, called as a witness WILLIAM BRAMLEY, who, being first duly sworn, testified as follows:

Direct examination by Mr. NEWBEGIN:

117 My business is that of an engineer; am in the employ of the Baltimore and Ohio Railroad Company; have been so since about the 20th or 25th of August, 1874. In January, 1882, I was employed as a machinest daytimes, at Chicago Junction, Ohio. In January, 1882, I was night foreman in the night. The accident to Sutherland was reported to me; learned of it between one and two o'clock, as near as I can remember; was up that night; had charge of the work, and was up all night; had charge of every man that night who was employed in the machinery department. Sutherland was under my charge. He was tending engines. His duties were to coal up engines, give them water and sand, and clean

out the fires. He had two other men with him—James Moore and E. D. Lewis. Lewis was hostler.

Q. You may tell the jury what these tenders, as you call them—what their duties were—what they were required to do—what their business was.

(Objected by plaintiff, by his counsel, as calling for the opinion of the witness.)

The Court: You may ask him.

Q. Mr. Newbegin: What were Sutherland's duties there; what was his business there to do that night?

(Objected to by plaintiff, by his counsel. Objection overruled and exception taken.)

A. His business was to help to give coal to the engines—that is, to fill the tender with coal and fill the tender with water and fill the sand-box with sand, and, I believe, help knock out the fires and clean the ash-pits.

Q. Under whose special orders, if anybody's, was he acting?

A. Nobody's but mine, except Mr. Gunther and the—nobody had the right to give him any orders except me, except Mr. Gunther saw fit to overrule me.

Mr. Doyle: We ask the court to rule this out. He has given what his opinion was simply.

The Court: No; he must not give his opinion.

118 Q. Tell us whose orders he was bound to obey.

A. I didn't say it was my opinion. I said he was in duty bound to obey my orders.

Mr. Doyle: I don't know how the witness can say that except as an opinion.

Witness: I was foreman that night, and he was bound to obey my orders, and nobody else's.

Q. Mr. Newbegin: You said something about Gunther's overruling you; who was Gunther?

A. He was what is pronounced general foreman of the machinery department.

Q. He had control of you?

A. Yes.

Q. Who employed the hands?

A. Mr. Gunther.

Q. Who employed Sutherland, if you know?

A. I don't know. I wasn't present when he was hired.

Q. State whether Lewis was under your charge, too, or not.

A. He was; yes, sir.

Q. What was his special business that night?

A. He pronounced it hostler.

Q. What was his special business as hostler?

A. To move engines—to take the engines in and out of the house.

Q. State by whose signal or order, when they went to the coal-chute for coal and to water, &c., the engine was moved.

A. There was one man there who took the number of the pockets of every and each pocket, and when he got up on the engine he looked into the tanks and pulled the paper out and told me to take it back to "10" or "11" or "20," or wherever he thought there was coal enough, or anywheres near enough to fill it up.

Q. Who was that man?

A. I don't know.

Q. Was it one of the helpers?

A. Yes; which one it was I don't know.

Q. But that was the helper's business, was it?

A. Yes, sir. He would take the number of the pockets and find out as near as his judgment — how much coal there was in 119 each pocket in the chutes on both sides. He would look at the tank and see how near it was empty, and then he could judge how near it was empty, and estimate what pockets would fill it up, and then he would tell the hostler to back—back the engine and set her at that pocket.

Q. While they were taking coal what was the helper's business?

A. To pull the apron down and let the coal into the tender and put up the apron.

Q. What then?

A. He would tell him to go ahead or back up.

Q. After it was done and the signal to him to go ahead or back up, for what purpose did he tell him that?

A. I don't know; it might be to go and take water or it might be to go and take sand, or maybe they had taken sand and water before; it might have been to go to the ash-pit; it is hard to tell.

Q. You have said that Lewis that night was acting immediately under your orders.

A. Yes; I was foreman; they were all subject to my orders.

Q. Was Lewis one of the men that night subject to your orders?

A. Yes, sir.

Q. State how it was that night as to your placing these helpers or Sutherland under the charge of Lewis?

A. I didn't place him at all; they were employed and was there before I took charge, and they all know their duty; I didn't place them at all.

Q. Did you or did you not place Lewis under anybody's orders but your own that night?

A. No, sir; only Mr. Gunther's; he could overrule me, of course; his orders overruled me.

Q. Did you or not tell Lewis to obey anybody in particular that night?

A. No, sir.

Q. I mean Sutherland?

A. No, sir.

Q. And were Lewis and the helpers then about their regular business that night as ordinarily?

A. Just as they had been going on ever since I was there;
120 it was the same thing every *every* night, one night after the
other.

Q. Did you know this engine No. 212?

A. I did at that time.

Q. Was your attention especially called to it so that you know about the character—the make-up—of the engine and tender—what kind of an engine it was?

A. It was a consolidation engine.

Q. Called a mogul.

A. They are called moguls, but it is not a mogul.

Q. Was it known there is the yard as a mogul?

A. They called them mogul; of course they understood one another that way, I suppose.

Q. What was its number—the one Sutherland got hurt on?

A. 212.

Q. Do you know how many tool-boxes there were on that tender?

A. Well, sir, on the side that Mr. Sutherland claimed he got hurt on there was one tool-box, and what we called a water-cooler.

Q. Where was that?

A. Right in front of the tool-box or clothes-box—whichever you call it.

Q. How far relatively between the front and the rear end of the tender was that tool-box situated?

A. Do you mean from the roof of the cab?

Q. No; I mean from about the middle of the tender or towards the front end or towards the rear end.

A. Well, I don't know exactly; there was what we call the tender valve on the end, and then there was the water-cooler and the tank, and they all stood pretty close together.

Q. Did all these rise about the same height, so that a man could stand on them?

A. Just about the same height—somewhere near about the same.

Q. How was it about the boiler protruded back into the cab in that engine?

A. The boiler extended clear back to the end of the cab—that is, inside.

Q. But clear back to this part of the cab?

A. Yes.

Q. Where did the engineer stand in moving the engine?

121 A. On the right side of the engine.

Q. When he would move it where would he be placed relatively to this tool-box—could he see them?

A. The back end of the cab was—you might call it a partition. It had windows in it, but very often the windows are smoked up from the fire, so you can't see out of them. It is optional to the men whether they are cleaned or not.

Q. What is the partition for?

A. In order to make it warm, I suppose.

Q. It was in the winter season, I suppose?

A. Yes, sir.

Q. Would or would not Lewis have to stand up by the side of the boiler, in the cab, to move the engine?

A. Yes, sir; he would.

Q. You are an engineer yourself?

A. Yes, sir.

Q. What is meant by the relief cup here—what is it for?

A. It is called that. If a man is running and he sees any danger he may reverse his engine. He opens that in order to keep from bursting the cylinder or the steam-chest. If you are standing in any place, and you have an engine that her throttle leaks, you open either of them or the cylinder-cocks in order to have the engine stand still.

Q. In starting an engine—in moving at all—state whether or not there would be an escape of steam?

A. There would if the cocks were open.

Q. Would it make a noise?

A. Yes, and a very loud noise too.

Q. Sufficient to be heard in any place in the tender or about it?

A Yes, or a square off.

Q. How far off?

A. Well, three or four lengths of the engine or further.

Q. Have you had any talk with Sutherland since his injury about how he got hurt?

A. Not as I remember of.

Q. You didn't see him that night at the time he got hurt?

A. Not right at the moment I was sent for; I don't believe the engine was moved before I got there.

Q. Do you know Peter George?

A. Yes, as a fireman; that is all.

122 Q. What engine did he come in on that night?

A. He came in on 212 that night.

Q. On the same engine that Sutherland got hurt on?

A. Yes.

Q. Did you see him about there after Sutherland was hurt?

A. Yes; I talked with him that night after I made preparations to send Sutherland home.

Q. Do you know what run that engine had been on that night?

A. No; I don't remember; they changed the time-card several times, and I don't remember that night the number of the run; I know she came in that night.

Q. You have told all you know about Sutherland's injury, have you not?

A. I don't whether I have or not; I have answered all the questions I have been asked.

Q. If you know anything more as to the manner in which he got hurt, you may tell the jury.

A. I don't know anything as to the manner in which he got hurt; I don't know how he got hurt; I wasn't there.

Q. You don't remember any statements he has made to you how he got hurt?

A. Not in regards to how he got hurt.

Cross-examination by Mr. DOYLE:

Q. You were working as machinest during that time?

A. During that night?

Q. Not that night; but that was your general business at that time?

A. Yes, sir.

Q. And you worked usually in the day-time?

A. Yes.

Q. In the round-house or in the shops?

A. In the round-house, but in both if it was necessary; whenever I was required.

Q. Did you work that day as machinest?

A. No, sir.

Q. You went on that night as night foreman?

A. Not that night.

Q. How long had you been night foreman?

A. Well, I think I was on in the neighborhood of four or six weeks.

123 Q. Then you were not acting as machinest at that time?

A. No, sir.

Q. You had been employed as machinest before that?

A. Yes.

Q. But you were not then working as machinest?

A. No, sir.

Q. And your business was as night foreman?

A. Yes, sir.

Q. All these men had been at work there before you came on as night foreman; also Sutherland and Moore and all the rest of them had been at work there right along, hadn't they?

A. I don't remember, in regard to Sutherland, whether he came on after I took charge or not; I don't remember that.

Q. You hadn't anything to do with the hiring or discharging of the men?

A. No, sir.

Q. And you didn't say anything to these men about their duties at all; they understood their duties just as well as you did, didn't they?

A. Yes, sir.

Q. You didn't say anything to them about it?

A. No, sir; not that night.

Q. You didn't tell these men what to do or how to do it?

A. No; I presumed they understood it.

Q. You say these men were all under your directions that night?

A. Yes, sir; except Mr. Gunther overruled me.

Q. You didn't go around the yard and say to these men "You are under my directions and nobody else's," did you?

A. No; they all understand that I was placed there by Mr. Gunther.

Q. As night foreman?

A. Yes.

Q. And the men were never called up and arrayed in front of you and told that they must obey nobody but you, were they?

A. No.

Q. Nor they were not told singly that they must obey nobody but you?

A. No.

Q. You never heard any direction given to them of that kind?

A. When I took charge as regular foreman at one time I saw a notice stuck up.

124 Q. Mr. Gunther was your superior?

A. Yes.

Q. And if Mr. Gunther told these men they must obey the hostler you wouldn't have a right to overrule that, would you?

A. Yes; in that respect I would.

Q. I thought Mr. Gunther had a right to overrule you?

A. Yes; but he had no right to go to the men and give them orders without coming to me; I am foreman.

Q. He had a right to discharge you?

A. Yes.

Q. A right to drive you out of the yard?

A. Yes, sir.

Q. But has no right to give any orders except to give them through you?

A. To give them through me with reference to my men.

Q. If he wanted to, but I suppose he didn't want to?

A. That would probably discharge me.

Q. When he hired a man he had a right to tell him what his duties were?

A. Yes, sir.

Q. And you had no right to contradict him?

A. No.

Q. Mr. Gunther did hire the men, didn't he?

A. Yes.

Q. You didn't see him when he hired Sutherland?

A. No, sir.

Q. Nor when he hired Moore?

A. No.

Q. Nor when he hired Lewis?

A. No.

Q. Nor when he discharged men?

A. No.

Q. What he told them as to their duties you don't know?

A. I wasn't there; when Mr. Gunther hired a man for another foreman he didn't tell him his duties.

Q. How do you know it?

A. I know it by his coming to me and saying "Here, I have a new man for you." All the foreman — uses his own pleasure where he puts him.

Q. He probably told the man he would have to work under you?

A. He would tell me so.

Q. Didn't he tell the man so?

A. I don't know.

Q. You don't know anything that Mr. Gunther told these men?

125 A. If I didn't hear it I couldn't tell.

Q. What Mr. Gunther said to these men when he hired them, or what he said to them at any other time, you don't know?

A. It is none of my business.

Q. But you did know that Gunther was charged with the business of hiring and discharging the men?

A. Yes, sir.

Q. And he was boss over you?

A. Yes.

Q. And nobody from him down had a right to overrule him?

A. No; but there was from him up, though.

Q. You had to get a higher man in order to overrule him?

A. Yes, sir.

Q. I understand that this cab of the consolidated engine had a partition across the rear end of it?

A. Yes.

Q. And was there a door to go in?

A. Yes, sir.

Q. A door to go into the cab to the place where the engineer stands on one side and the fireman on the other?

A. Yes.

Q. That has a glass in it?

A. Yes.

Q. And that glass is very apt to become obscured by the smoke of the engine on the journey?

A. Yes; it is left to the option of the engineer and fireman whether they keep them clean or not; it is not the hostler's job.

Q. He has nothing to do with that?

A. No.

Q. That engine has just come in from a journey?

A. Yes.

Q. The probabilities are that the glass was considerably obscured by the smoke?

A. It may have been; I didn't notice that.

Q. The doors of the cab closed to keep the engineer and fireman warm?

A. That is their own pleasure—if they wish them that way.

Q. Was it a cold night that night?

A. I don't remember in regard to that.

Q. You have described the duties of the hostler and the duties of the assistants or helpers, whatever you call them; you have told us what their respective duties are; were you ever hostler?

A. Yes—that is, I filled the hostler's place.

126 Q. When these hostlers were hired and when these assistants were hired you didn't instruct them as to their duties?

A. If Mr. Gunther fetched them there to me and told me to set them at work if either one of the places was vacant I would go with him and tell him to help.

Q. When Mr. Gunther sent a new man you would take that man and tell him what to do?

A. I would show him.

Q. You didn't give these particular men any instruction as to their duties—these men there operating that night?

A. No; nothing particular; I would go and say: "Boys, here is a man who will help you to-night."

Q. But these men—Lewis and Moore and Sutherland—you had not given them any instructions, had you?

A. That night?

Q. Yes; or any other time?

A. No; I don't think I had.

Q. So they got the information they had, whatever it was, as to their duties from somebody else?

A. No; they never changed the whole outfit at once, and there would be, maybe, two men or one who would know their duty and they would tell the others.

Q. That was somebody else beside you?

A. Yes.

Q. Then these men got their instructions as to what their duty was from somebody else beside you; that is right?

A. No; I don't think it is; I would take them down there to the engine——

Q. I mean these men at the time this man was hurt?

A. They were there when I took charge.

Q. You didn't instruct them as to their duty?

A. No.

Q. Then they got whatever instructions they got from somebody besides you?

A. They got it from the regular foreman previous to that.

Q. Whatever instructions that these men who were operating that coal-chute and that engine that night—whatever instructions 127 they had received as to what their duty was—came from somebody else and not from you; isn't that true?

A. I don't remember of going out there and instructing them as to their duty; they were employed and had been there before I took charge that night.

Q. What instructions they did get you don't know?

A. No, I don't know; that is among themselves.

The Court: That engine came in there that night off the road; whose duty was it to give directions as to what was to be done with the engine that night before it was put into the round-house?

A. As a general thing the engine comes in with a train and pulls up into the yard, and she backs down alongside of the coal-chutes; the engineer and fireman are in duty bound to place that engine there at the coal-chutes somewhere on that track; there is no particular point specified.

Q. Suppose the engine comes in without coal or water?

A. Yes, and sand.

Q. Whose duty is it to direct that coal and water shall be put into the engine before it is put into the round-house?

A. There is as a general thing three men—the hostler, and what they call the coal-chute man, and then the men to help.

Q. Who determines whether there shall be any coal put on to that engine?

A. The Baltimore & Ohio R. R. Company.

Q. No, they don't; they are not there at all. Who is to be the judge and determine whether it is necessary to put coal on her at all?

A. The fireman's business it is.

Q. That was your business that night?

A. Yes, sir.

Q. You said you didn't tell them anything about it that night?

A. It was my duty, if she came to the house without her supplies, to send her back or find out the reason why.

Q. Mr. Doyle: Have the tenders a right to direct the hostlers or have the hostlers a right to decide? 128

A. One has got just as much as the other.

Q. How do you know?

A. Of course no other one has got any.

Q. How do you know?

A. I was put there as foreman. I appointed nobody as foreman under me.

Q. The Court: You didn't tell them—anybody—that night you say; whose business was it to go the chute and get that coal?

A. The hostler's and the two tenders.

Re-examination:

Q. Tell the jury whether it was their business to go and do that as a matter of course without any direction.

The Court: He says he exercised control if they came into the round-house without it. He says he didn't exercise any control or direct anything about it, but took it for granted that they would do their duty.

Q. Mr. Newbegin: You were placed there to see that the men discharged their duty?

A. Yes; and if an engine came to the house without supplies they would explain to me the reason why.

Q. You said that this No. 212 was a consolidated engine?

A. Yes, sir.

Q. Do you know the relative height of No. 212 with the apron of the coal-chute, compared with this model; are they about the same relatively?

A. Do you mean the height from the ground or from the tender?

Q. From the tender.

A. Oh, they just fall down clear of it.

Q. These tool-boxes or water-coolers were along here somewhere?

A. There is a tank valve placed right there; that will take up a space of eight or nine or ten inches. The water-cooler is right up against that and the tool-box is right against that.

Q. Do you know whether a man could stand on the top of a tool-box and close that door without climbing up?

A. He could; yes; it is not absolutely necessary for any-
129 body to climb up on the engine; they can use what we pro-
nounce a scraper, or a poker, in regards to that feature, or a
bar of any kind.

The Court: They couldn't reach that with their hands?

A. No, sir.

Q. Mr. Newbegin: Did they have any instructions as to the use of that—the helpers?

A. Not as I know of—no, sir.

Q. Do you know whether No. 212—this consolidated engine—how it compared with other engines as to the height of the top of these tool-boxes?

A. They are about the same, I guess—that is, that class of engines.

Q. How do they compare with the ordinary engine, with a passenger engine, or an ordinary freight engine, as to height?

A. I don't know.

Defendant, further to maintain the issues on its behalf, offered as a witness one Edward Lewis, who, first being duly sworn, testified as follows:

Direct examination by Mr. Newbegin:

Q. Your are in the employ of the defendant, the Baltimore and Ohio Railroad Company?

A. Yes, sir.

Q. How long have you been employed?

A. Eight years the 21st of this month.

Q. And what has been your business?

A. Hostlering, engineer, and working at the coal-chutes; I was a laboring man first when I started; when I commenced to work for the Baltimore and Ohio Railroad Company I went to tending coal-chutes and help to coal up engines—water them, cleaning the fire, and giving them sand; I was helper to the hostler.

Q. How long had you worked as such helper?

A. I don't know; I commenced to work the 25th of December, and I worked along until, I think, the next June some time.

Q. As such helper?

A. Yes, sir.

130 Q. Six months, then?

A. Yes, sir.

Q. What did you do next?

A. I went [to] painting engines in the round-house.

Q. How long did you work at that business?

A. I could not tell you.

Q. About how long?

A. I couldn't say; maybe a couple of months or such a matter.

Q. What next?

A. I went to painting a yard engine next.

Q. That is what is called a pony engine?

A. Yes; or a switch engine, switching in the yard.

Q. How long did you work at that?

A. I worked there about three years, off and on.

Q. What next were you working at?

A. I went to work painting, hostlering, and painting engines in the time.

Q. Hostlering, more or less?

A. Yes, sir.

Q. How much did you hostler during that three years altogether?

A. I couldn't say; didn't pay no attention to it.

Q. In 1882, in January, at the time of Sutherland's accident, what were you doing then?

A. Hostlering.

Q. A regular hostler, or only just at intervals?

A. I was hostler because they didn't have anybody else in the place of hostler.

Q. What was your regular business then?

A. I was firing a yard engine at that time.

Q. Have you done regular hostlering since?

A. No, sir.

Q. You are an engineer now?

A. Yes, sir.

Q. Running on the road?

A. Running on the yard; I think I took an engine two years ago last June.

Q. How long had you known Sutherland at the time of this accident?

A. I think I have known him ever since I came to Chicago Junction.

Q. How long had he been in the employ of the road, and what was he doing at the time of the accident?

A. I don't know.

131 Q. In what employment by the road did you know he was engaged in?

A. He was a helper at the coal-chutes when I was appointed hostler. He was working the round-house—round-house work—coal-chutes. I seen him there.

Q. How long was he there?

A. I don't know.

Q. Had you seen him to work there the year before?

A. No, sir; I don't recollect him working there. All I know is that he said he had worked there before. I don't know; I wasn't working there at the time.

Q. At the very time of the accident you may state just what you were doing. Who took the engine there to get coal?

A. I did.

Q. At whose directions?

A. Well, we all walked down together. We took the engines into the round-house before this. We had taken in nine engines this night, us three together—Mr. Moore, Mr. Sutherland, and myself.

We walked down from the round-house together. We got onto the engine 212. She was situated just a little bit below the coal-chute, west of the coal-chute about the length of herself. I got onto the engine. Moore told me to go to No. 11 pocket.

Q. What was Sutherland doing right there?

A. I don't know. We moved to No. 11 pocket, and let down the pocket to take coal. We was all on the tank together.

Q. Who let down the pocket?

A. I don't know. Mr. Sutherland may, I guess. I was on the top of the tank taking coal. We needed about 20 or 25 bushels—I couldn't exactly say how much—to fill the tank, and Mr. Moore got up on top of the chute. He said: "I will go up and see where we can get a pocket to fill the tank." He walked around and came back and said: "No. 8 pocket has got about what we want." 20 or 25 bushels that was. He was three pockets back. We were at No. 11 at the time, and we wanted to move back to No. 8. Sutherland was standing at the last pocket between the apron and the engine.

132 Q. On the engine?

A. No, sir; he was standing on the apron at the time. I got down off from the tank and looked into the fire-box. I seen my fire was about out and only had about 40 pounds of steam. I said: "We have got to hurry and get this engine in in order to keep from punching her in." I got right inside of the cab, on the engineer's side, and he gave the signal, "All right." I gave her the throttle and moved about a foot. I found my relief cups open, and shut her off, and went to shut my relief cups. After moving back again I felt the jar of the engine, and shut off. He said: "Move ahead; you have ketched my leg." I moved the engine ahead and walked out to him. I asked him what he had done it for, and he said: "I don't know."

Q. Did you move the engine at all before Sutherland told you all was right?

A. No, sir.

The Court: You say he gave the signal; what did he say?

A. He said: "All right." We were on the tank together. I forget now just exactly what the signal was. It was "All right," or "Go ahead," or "Everything is all right," or "Back it," or whatever it was. He was on the tank fastening up a loose pocket when I got off from the tender. I stood there waiting for the signal.

Q. Mr. Newbegin: Who?

A. Mr. Sutherland, the man on the tank. Moore was on top of the coal-chute.

Q. The Court: Did he say "All right" or make a signal which indicated all right?

A. He said: "All right." It was in the night.

Q. Mr. Newbegin: State whether or not it was in response to that signal of his, "All right," that you moved the engine.

A. Yes, sir.

Q. State whether or not there was any escape of steam—what the fact was as to that.

133 A. There was escape of steam from the relief cups.

Q. How far could that be heard?

A. It could be heard from here to Summit street, or further than that.

Q. How were you standing with relation to Sutherland?

A. With my back to Mr. Sutherland.

Q. Could he see him any, where he stood?

A. No, sir.

Q. Even if you had been looking in the direction of him?

A. Not unless he was standing on the right-hand side of the engine, but where he was standing or stood I didn't know nothing about where he was to work, for it was where I couldn't see him.

Q. You have spoken about there being only 40 pounds of steam. State what you were required to do as to getting the engine back into the house with or without producing more steam?

A. As far as that is concerned, it is a railroad and we need to get the engine in *with* taking advantage of the engine. I am supposed to look after the engine; to see that it is all right and taken into the house—take charge of her that she don't lose her water and burn herself, or anything of that kind, and I was taking advantage of her to get her in; I am supposed to look after the engine.

Q. Did you or do you make more steam after they come in?

A. Sometimes, if it is required; if we can't get them in without it we make more steam.

Q. Can you get the engine in with 40 pounds?

A. Yes, sir.

Q. How was it as to their losing steam all the time—that engine, that night?

A. She would have lost all her steam in the course of time.

Q. What was the fact as to your hurrying to get her in before the steam was gone?

A. We wanted to get her in in order to get done with the work, more than anything else.

Q. What kind of an engine was it?

A. Consolidated engine No. 212.

Q. Where, if you know, was Sutherland at the immediate
134 time of his injury?

A. I don't know nothing about him where he was; I didn't see him.

Q. Did he tell you anything?

A. No, sir; nothing more than I asked him what he done it for—what he gave the signal all right for, and he said "I don't know." That is all that passed between us at the time.

Q. Where was Sutherland standing or sitting when you left him to go to the engine—where did you last see him?

A. He was standing on the apron when I last saw him.

Q. On what part of the apron?

A. Standing on the cross-piece, which was half on the inside and half out. (Referring to model.) This ain't no coal-chute. There is a cross-piece comes out here six inches wide—chains connected to it—and runs over pulleys. He had one leg on the outside and the other on the cross-piece.

Q. How is it as to the chains being clear out to the front part of the apron?

A. It runs within about six inches or eight. The cross-piece runs across the apron here.

Q. What is that chain fastened to?

A. To this (indicating on model); and runs over a pulley with a weight to it.

Q. Describe how he was standing.

A. With one foot here and the other one outside here.

Q. Which was outside?

A. Here is the inside of the apron; he was standing with one foot on here and the other foot up here when I got off from the cab.

Q. The COURT: Were either of his feet between the apron and the locomotive when the engine moved?

A. One was between the cab and the apron.

Q. Where was the other one?

A. Up on top.

Q. Mr. NEWBEGIN: On the apron itself?

A. Yes, sir.

Q. What, if anything, was said between you when you went in about a signal?

A. Nothing said.

135 Q. State at whose signal it was, if any, that you moved that engine.

A. I was supposed to go with either one of the two men's signals; I am supposed to go by either one of the two men's signals.

Q. Was it your business to move the engine after a signal from either one of them?

A. Yes.

Q. Did you wait for a signal that night?

A. Yes, sir.

Q. How was it as to the necessity of Sutherland's getting up on the apron at all to close it that time on that engine?

A. It wasn't necessary at all.

Q. Why not?

A. Because you could reach the apron from the box.

Q. With your hands?

A. Yes; or with his shovel or anything.

Q. How was the top of the tool-box, or whatever you choose to call it, comparatively to the top here—the door at the top here compared with an ordinary engine—higher or lower?

A. I don't know what you mean.

Q. Was this consolidated engine No. 212—did it have this tool-box up higher than a common engine, so that he could have reached — without climbing up?

A. The tool-box stood up maybe six or eight inches higher than that flange of the tank, and the small tool-box in front of this pipe, and the water-cooler in front of that yet.

Q. Standing on that could he reach this door to shut it without getting up on the apron?

A. He could stand on the tool-box or the clothes-box.

Q. How do you know he could have reached it?

A. I worked right there and have reached it myself and shut them up many a time myself without without getting up on the apron at all.

Q. From that engine?

A. From a consolidated engine—they are all alike.

Q. The others were like this 212?

A. Some passenger engines, some camel engines, you can't
136 do it, but the consolidated I am talking about.

Q. Tell the jury how far back the end of the boiler came in reference to the cab in 212.

A. The end of the boiler comes out exactly with the cab here; its door opens up here; instead of a window here there is a door; you walk into the side here and the boiler runs clear back even with this; the throttle stands clear up on the boiler; the throttle is about the center of the cab inside, on the right-hand side; you have to reach it with your left hand; the engineer's side is on the right-hand side.

Q. Where is the reverse lever?

A. On the right-hand side of the engine up in the cab.

Q. Neither of them is at the end?

A. No; there is nothing at the end at all; they are on the inside of the cab.

Q. Where is the lever situated that these relief cups are connected with?

A. Right inside by the boiler; it runs down here; there is a rod.

Q. Where is the handle of it?

A. Standing away up on top of the boiler.

Q. Inside of the cab?

A. Yes, sir; on the right-hand side.

Q. Then are all the levers that the engineer has to operate in moving that engine or operating it for any purpose situated up in here, on the right-hand side of the boiler?

A. Yes; everything the engineer has anything to do with is on the right-hand side of the boiler.

Q. Standing up there could you or not, when engaged there, see Sutherland standing back here?

A. No, sir.

Q. Of whom did you receive your orders as to how you were to do your work at the time you were acting as hostler?

A. I was hired to hostler to take the engines in and out.

Q. Hired by whom?

A. By Mr. Gunther.

Q. Did he or any one, and, if so, who, give you any special orders
as to how you were to discharge your duties there prior to
137 Sutherland's injury?

A. When I first went to work there I understood my duty from Mr. Gunther. He told me what I had to do—what my duty was—when I hired to work.

Q. That very night of the injury to Sutherland, under whose immediate direction were you?

A. Nobody's; only I was working just the same as I always did work.

Q. In case you hadn't done your work well whose business was that?

A. Mr. Bramley was foreman that night.

Q. State whether prior to the injury to Sutherland you had orders from anybody to control Sutherland's movements as to his duties?

A. I went by Mr. Sutherland's orders the same as I did any other man's. As long as he was working on the coal-chutes and tending the engines I went by his signals.

Q. I asked you whether anybody—Mr. Gunther or anybody else—placed Sutherland under your control.

A. I don't know anything about it.

Q. If anybody told you Sutherland was to obey your orders you would know it?

A. Yes, sir.

Q. You had no such instructions?

A. No, sir; no instructions of that kind at all.

Q. From any source?

A. No, sir; I was hostlering, and I wasn't boss.

Q. There has been something said about this trap-door clogging up with coal, so that it can't be shut. Is there any means of getting away that coal without climbing up with your hands?

A. Oh, yes; I could use the shovel or the scraper.

Q. Was there a scraper there in the tender which could be used?

A. Oh, they are on the engines all the time, and also a shovel.

Q. Did Sutherland know that?

A. I don't know; he has used them often enough, I suppose; he has been working there.

Cross-examination by Mr. Doyle:

138 Q. How tall are you?

A. About 5 foot 11, I believe, as near as I can recollect.

Q. How tall is Mr. Sutherland?

A. I don't know; I never saw him measured.

Q. He is considerably shorter than you are?

A. I don't know anything about that.

Q. You have worked alongside of him?

A. Yes; I don't know how tall he is; I never stood up by the side of him; I never thought anything about it.

Q. You are still in the employ of the Baltimore and Ohio Railroad Company?

A. Yes, sir.

Q. And now acting as engineer?

A. Yes, sir.

Q. Prior to the time you acted as hostler that night you never had acted as engineer on the road?

A. No, sir; well, I had run one or two nights before that.

Q. But you had acted as foreman on an engine—on a pony engine in the yard?

A. Yes, sir.

Q. Were any of these hostlers that acted there in the yard engineers?

A. Yes, sir; the day man at that time was an engineer.

Q. And your experience as engineer was confined to your business as fireman, excepting one or two nights?

A. Yes, sir.

Q. You did that to fill somebody's place when somebody was off?

A. Yes, sir.

Q. You say after you started the engine up that night; I suppose you started to back up?

A. Yes, sir.

Q. After you had gone about a foot, I understand you, you found that your relief cups were open?

A. Yes, sir.

Q. Did you stop the engine then?

A. I did.

Q. And then you closed the relief cups?

A. No, sir; I didn't say I did.

Q. Did you?

A. No, sir.

Q. Did you try to close them?

A. Yes, sir.

139 Q. What did you do?

A. Took hold of the lever and pushed down on the relief-cup lever.

Q. Did it close it?

A. No, sir; I turned around and took hold of the lever and the engine went back.

Q. After you stopped the engine and discovered that the relief cups were open, and attempted to close them, you started the engine up again?

A. Yes, sir.

Q. Did you give any signal that you were going to start up again?

A. No, sir.

Q. After the engine stopped, after it had been moved about a foot, you started without giving any signal, or receiving any further signal?

A. Yes, sir.

Q. At that time you didn't know where Sutherland was?

A. No; he was standing on the apron the last time I saw him, when I got down off the tender and went into the cab.

Q. Why did the relief cups not shut?

A. Sometimes the rod bends on them—it is a long half-inch iron rod; sometimes they will bend down, and sometimes they will shut off all right; I didn't want to bother with it, I had only a short distance to go.

Q. Did you use your foot in trying to shut the relief cups?

A. No, sir; you can't get your foot that high.

Q. Sometimes you have to get down and go and shut them?

A. No, sir.

Q. You know of persons doing it, don't you?

A. No, sir; I never seen anybody do it.

Q. After you stepped down and got into the cab, how soon after that did you hear the words "All right?"

A. I wouldn't be very positive; it was as much as two or three minutes. There was time enough for him to have his work all ready for me to back up at the time he gave the signal.

Q. Where was the fireman at that time?

140 A. Sitting on the left-hand side of the engine; I could just see him over the boiler; I don't know whether he was standing up. I think we knocked the tallow can off from the top of the boiler when we first started the engine up. When we took the engine I think he was sitting down, and I think he stood up then; I didn't pay much attention to it.

Q. At the time you started the engine, what was he doing?

A. When I first got onto the engine he was lying down asleep.

Q. When you commenced to take coal, what was he doing then?

A. Standing there, awake.

Q. Were the doors shut going into his department?

A. I don't know; I wasn't on that side of the engine.

Q. You said that the words which Sutherland spoke were "All right?"

A. Yes, sir.

Q. You are positive?

A. Yes, sir, I know it; that is all I heard him say.

Q. When you heard that you moved your engine?

A. Yes, sir; moved it about a foot and then shut it off.

Q. How long was it stopped then?

A. A second or so; I just shut the engine off, reached over to the relief cup and found it wouldn't work, and says to myself, "I have got only three pockets to back; I will not bother with it."

Q. Where was Moore?

A. Three pockets back.

Q. How high is the shed?

[A.] About thirty feet. The distance from the top of the shed to the pocket is——

Q. How far was he horizontally?

A. It was about fifty feet.

Q. Fifty feet away, and about thirty feet high?

A. About 30 feet.

Q. Did you see him when you heard this word "All right?"

A. I couldn't see him; I supposed he was there.

Q. He says he came back forwards towards Sutherland.

A. I don't know whether he did or not; I don't know where he was.

Q. He may have been right over Sutherland?

141 A. Yes; he might have been on the other side of the chutes for all I know.

Q. You are certain that it was Sutherland's voice that said "All right?"

A. That I don't know anything about; I don't know whether it was Sutherland's voice or not; I took it for Sutherland's voice—"All right."

Q. You don't know positively that it was his?

A. I wasn't out there to see him.

Q. You don't know but it was somebody else's?

A. There was nobody else around there but Mr. Moore; there might have been somebody standing around the coal-chutes for all I know; I wasn't out to see.

Q. I understand that when you got into your engine or at some time during this performance you found you had to work pretty quick to make the amount of steam you had on hand get you into the round-house, and said, "We have got to hurry up, boys."

A. We were in a hurry with the engine because of lack of steam.

Q. Did you say that?

A. I just remarked and said it, that we had to hurry to take the engine in on account of want of steam; we were talking about it.

Q. That you had to be in a hurry?

A. Yes; and we were talking about something else when we took the engine.

Q. How soon after you got into the cab did you discover that you had to be in a hurry?

A. I knowed it when she first come in; the engineer told me so.

Q. When did you have this talk about it with Sutherland and Moore?

A. I don't know whether Sutherland was in hearing or not; I talked to Moore about it because he was the coal-chute man.

Q. You were in a hurry?

A. A railroad man is always in a hurry; it is always natural for a railroad man to be punctual in his business and get his
142 engine in as quick as he can.

Q. Sometimes that very hurry is what hurts people?

A. No, sir.

Q. You know that this matter of being in a hurry never hurts anybody?

A. It never hurt anybody I was concerned with.

Q. You feel a little anxiety about this case?

A. No, sir; not at all.

Q. You are the man charged in this case with negligence?

A. Yes, sir.

Q. You understand that you are the man chaged in this case with being negligent?

A. I know I was the man who handled the engine at the time he was hurt.

Q. You feel a little anxiety about it?

A. No, sir.

Q. Have you talked about it with anybody?

A. I have expressed my opinion, and I made a written statement about it.

A. You have talked with Mr. Rankin about it?

A. Once.

Q. Talked with Mr. Newbegin about it?

A. No, sir; I never met him but once in my life that I recollect of.

Q. Did you ever have any conversation with Brewbaker about it?

A. Only once.

Q. When was that?

A. I couldn't tell the day or date.

Q. About when?

A. I don't know.

Q. You know whether it was yesterday or last year?

A. Quite a while ago.

Q. How long after the accident?

A. I don't know exactly; he was sent over just the same as some of the rest of them were sent over; he asked me questions; I made up my mind it was none of Mr. Brewbaker's business; I wasn't sworn.

Q. Did you tell him the truth?

A. Every word I told him was the truth.

Q. You are sure of it?

A. I thought it was none of his business, and I thought he was under the influence of liquor; I didn't want to talk with him.

Q. You seemed to have something to do with Brewbaker's being under the influence of liquor?

A. I didn't want to talk to him.

Q. He is not in favor with the company at present?

143 A. That don't make any difference.

Q Doesn't make any difference?

A. I don't know; that is your opinion.

Q. You did tell Brewbaker something about it?

A. Yes, sir.

Q. Did you say anything about having pulled that throttle wide open?

A. No, sir.

Q. Did you pull that throttle wide open?

A. No, sir.

Q. You never said to Brewbaker or anybody else that you did?

A. No, sir; I never did.

Q. Can you tell me what you did say to Mr. Brewbaker?

A. No, sir; I merely told him as I gave you this statement here; that is all the story there is about it; I couldn't tell anything else.

Q. Did you go into the details of it with Brewbaker?

A. No, sir; I just merely told him how the accident happened, as I told it here.

Q. Didn't you tell him that after starting the engine up, after trying to shut your relief cups, that you pulled the throttle wide open?

A. No, sir.

Q. You are sure you didn't tell him that?

A. No, sir; I know it.

Q. You didn't tell him anything about trying to shut those relief cups and failing?

A. I might have told him I tried to shut them, just as I told you here in the statement.

Q. And that in trying to do it you pulled the safety-valve wide open?

A. What do you mean?

Q. I mean the throttle.

A. No; you don't have to pull the throttle open to move the relief cups.

Q. If you pull her wide open you give her a full head of steam?

A. Yes, but I didn't pull it wide open.

Q. How long did you remain in the employ of the company after the accident occurred?

A. I have been working for them ever since; I was off, I think, three or four days afterwards for investigation.

Q. Discharged, in other words, by the railroad company?

A. I was off for investigation. Discharged? Yes, there was
144 a voucher sent to me.

Q. You were discharged precisely on account of this accident?

A. Yes; that is what they discharged me for.

Q. How long did they keep you off?

A. About six weeks, I think.

Q. During that six weeks did they have any conversation with you about what you would testify to here?

A. No, sir.

Q. Was there any investigation had?

A. Only with Mr. Harrison; that is all the investigation I had.

Q. He restored you after six weeks?

A. Yes, sir; he came to me before that and told me I should go to work.

Q. In the sand-house, a short time after you were reinstated, within a week probably, the third or fourth night, did you have a conversation about how this accident occurred, in the presence of Mr. Brewbaker and Mr. Burge?

A. I never talked with Mr. Burge.

Q. Did you have a conversation when they were present?

A. Not as I know of; oh, I have talked with all the boys about it; they all spoke about it; it has been talked about all over town by Mr. Severance and the balance of them.

Q. Did you have a conversation at that time and place about how this accident occurred with Mr. Brewbaker?

A. I don't know.

Q. And didn't you express regret in that conversation that you moved that engine without orders?

A. No.

Q. Did you say in that conversation what I have already asked you; that you attempted to start the engine, or got ready to start it; that you moved to shut your relief cups; that you undertook to shut the relief cups and couldn't, and then while doing that you pulled the throttle wide open?

A. No, sir; I din't say anything of the kind.

Q. But did you say anything in that conversation about having received a signal from Mr. Sutherland?

A. No, sir.

Q. Didn't Mr. Brewbaker, in that conversation, say to you
145 this after you had related what you did, "Then you didn't
mean to start the engine?" and didn't you answer and say
"I didn't mean it should back?"

A. No, sir; I never made no remark to Mr. Brewbaker anything of the kind.

Q. You didn't say, after you got through that conversation, that you were afraid you went a little too far?

A. No, sir.

Q. That you were afraid you told them too much?

A. No, sir.

Q. Nothing of that kind?

A. No, sir.

Q. You say you are supposed to look after the engine?

A. That is all I was in duty bound to do—to look after the engine.

Q. When you found an engine there near the coal-chute track, left by the engineer, it was your duty to take it away?

A. I got onto the engine.

Q. And moved her?

A. When I got the signal.

Q. You say no special instructions were given to you?

A. No, sir.

Q. And you gave no special instructions to anybody else?

A. To nobody else; I had no right to.

Re-examination:

Q. Mr. Lewis, who is this Mr. Harrison whom you say you were sent to?

A. That I was sent to? I didn't say that.

Q. Who restored you?

A. The general master mechanic of the Baltimore and Ohio road.

Q. Above Gunther?

A. Yes; he was general master mechanic.

Q. Were you ever charged with negligence in this matter by anybody in the employ of the company?

(Objected to by plaintiff, by his counsel, and sustained.)

Q. Were you discharged from final employment, or merely for investigation?

A. I was laid off for investigation, as I understood it; but I got my time; I was discharged.

Q. But after the investigation you were restored?

A. Yes, sir.

Q. The Court: They didn't pay you for the time you were off?

A. No.

146 Q. Mr. NEWBEGIN: Has anybody in authority in this railroad company ever said a word to you as to what you should testify here?

(Objected to by plaintiff, by his counsel.)

The COURT: You may go on, but I will allow the other side to cross-examine about it.

Q. When you alluded to the fireman there, what fireman did you mean?

A. The fireman of 212; Mr. Pete George.

Q. Did you have any fireman there?

A. No, sir; I had no fireman; hostlers don't have no firemen; they do their own firing.

Q. You refer to the fireman who had come in on the regular run?

A. Yes, sir.

Q. That fireman was George?

A. Yes.

Q. When you speak of that engine starting back about a foot, and you tried to close the cups there, what is the proper name for those cups?

A. Oil cups or relief cups.

Q. Are they sometimes called escape-valves?

A. No, sir; relief cups.

Q. When you tried to close them——

Q. THE COURT: Show the jury what it was.

A. It is a relief for the cylinder; that is all. On them consolidated engines, some has oil cups and some relief cups. You pour the oil into the relief cups; they are for oiling the valves, or relieving steam from the cylinder, so a man can handle the engine easy. Sometimes the engine—the throttle—gets full of steam, and they open her, so she won't move. Sometimes her throttle and the cylinder gets full of steam, and the engine moves backward or forward, and they open the relief cups, so the steam will get out.

Q. If you let steam enough in she will move the engine?

A. Yes; she will move off whether the relief cups are open or not.

Q. When you started back there about a foot, and then tried to close the relief cups, tell the jury whether the engine came to a dead stop.

A. She came dead still—right on the dead stop.

147 Q. How long did she remain so?

A. A second or so. She moved about a foot, and I heard the relief cups open, and I reached over to shut them off.

Q. How long a time had elapsed from the moment you heard the signal "All right" until you heard Sutherland shout to go ahead—that he was caught?

A. Well, I shut her off before he holl*er*ed at all.

Q. You had actually shut it off before he holl*er*ed at all?

A. Yes; I felt the jar of it before. We had only about two feet or two and a half to move.

Q. The whole thing transpired in a second or two?

A. Yes—in two or three seconds.

Q. Why did you shut it off before you heard him call out to go ahead?

A. I felt the jar of the engine; I shut the engine off and started out, and he hollered to me to go ahead.

Q. When you felt the jar of the engine did you stop it because you knew something was wrong?

A. Yes; I knowed something was wrong.

Q. When you felt the jar did you immediately stop the engine, as quick as it was in your power?

A. I stopped it right off. I had my hand on the throttle all the time.

Q. Tell the jury with what degree of force the engine backed back—whether rapidly or otherwise.

A. I wasn't going over four miles an hour; I couldn't go over four four miles an hour in the distance. I don't hardly think I was going that fast. It was only a short space. You can't get the engine to move that fast in that time, especially with only 40 lbs. steam.

Q. How far did the engine move altogether?

A. Not over two feet or two and a half.

The COURT: I think you are going over this thing for the second time.

148 Q. Do you mean when you say it was only two feet and a half that the engine moved backward that it was but two and a half feet before Sutherland was caught or two and a half before you stopped the engine?

A. I couldn't tell you the distance; I never measured it. I should judge the engine moved back about two feet. Between the apron and the cab the space is about three feet that the engine could move before it struck the cab.

Q. It didn't tear the top of the cab off?

A. No, sir; it never hurt the engine at all.

Deposition of F. J. Gunther.

Defendant, further to maintain the issues on its behalf, called as a witness one F. J. GUNTHER, who, being first duly sworn, testified as follows:

Direct examination by Mr. NEWBEGIN:

Q. You are in the employ of the Baltimore *of* Ohio Railroad Co.?

A. Yes, sir.

Q. How long have you been employed by them?

A. Not being particular to a few days or months, it is about 18 years.

Q. And during that 18 years, generally, what has been your business?

A. In the first place I was working as journeyman machinest about four years, or such a matter; it may have been more or less.

After that I was general foreman under the master mechanic at the shops at Dansville, and then I was sent to take charge of the machinery of the company at Chicago Junction, on the 22nd of February, nine years ago next February.

Q. In '76?

A. I wouldn't say the year without figuring back, but it was nine years ago.

Q. Did you remain in charge of the machine shops down to the time that Sutherland was hurt?

A. Yes, sir.

Q. Did you know Sutherland at that time?

A. Yes, sir.

149 Q. Who employed him?

A. I did.

Q. Tell what you employed him to do.

A. I employed him to work at the shop at night.

Q. What was his business there?

A. The man's business at the ash-pit at night is to help from the time an engine comes in to take coal, water, and sand and clean out the ash-pan. He gets down in the pit and cleans out the ash-pan, while the other helper knocks the fire out of the furnace. The man in the ash-pit scrapes it out of the ash-pan, and from there the engine goes into the house; that is the last part of it—cleaning out the fires.

Q. How long had Sutherland been in the employ of the company when he got hurt there?

A. At that time between fourteen and fifteen days; I could tell by studying it a little. He went to work on the evening of the 16th day of January—I think it was January—and he got hurt on the morning of the 31st.

Q. Had he never been employed by the company previous to that time, if you know?

A. Yes, sir.

Q. When was that?

A. I couldn't give the date; I think it was the winter before this accident occurred.

Q. How long was he at work for the company then?

A. I couldn't say the time, but I believe the greatest part of the winter. It may have been three or four months; I couldn't say the time exactly.

Q. What was his business in 1881?

A. Working in the day-time, cleaning out ash-pits, and also help-coal them and take water or sand, and shovelling the ashes out of the ash-pits.

Q. Except, perhaps, the additional work of shovelling the ashes out of the pits his duties had been the same in the previous winter, in 1881, as they were when he got hurt?

A. No; not exactly. The difference is that the day men, in addition to helping get in the engines, puts in the time he has
150 got to spare in shovelling the ashes out of the pit, while the
night men have not got that to do, on account of its being

night, and the men at the chutes have to get upon the chutes; the night man that helps the man at the chutes; the two of them work at the chutes to take coal, in addition to what the day men did in the other case.

Q. Did he, so far as coaling the engine and taking water and sand, did he learn that same business in 1881 which he was required to do in 1882 when he got hurt?

A. I couldn't say positively as to that; I couldn't say that he did. This taking coal was something that the day man wasn't required to do, but I always made it a point when I put a man at work there to tell him what he is to do, or else place him with somebody that will instruct him as to what his work is.

Q. Did Sutherland have the means of learning what his work was?

(Objected to by plaintiff, by his counsel. Objection overruled, and plaintiff, by his counsel, then and there excepted.)

A. He had the means that most any person would have — placed there with two men who are posted in the work, and are doing the work right straight along; the same means of knowing that a person would have by being placed with them to do this work.

Q. Tell specifically to the jury what Sutherland's business was there as night helper; what he was employed to do.

A. His business was to go along with the engine from the time they started at the chutes to take coal, to help at that, to help take sand. I do not give this as always the order; sometimes it varied. They might run the engine up to the penstock where they took water. They would take sand, water, and coal, and scrape the ash-pan out at the pit, and knock the fire out of the engine; that was a part of the work. In addition to that, what time they had they were to keep the sand dry in the sand-house.

Q. Tell the jury who the hostler was there at that time
151 when Sutherland got hurt.

A. The hostler that night was Edward Lewis.

Q. Was he under your control too?

A. Yes, sir.

Q. What was his duty?

A. To take charge of the engine from the time she was left by the engineer. It is the engineman's business to bring the engine in—either to the coal-chutes or somewhere on the track which passes by the coal-chutes—to bring the engine in off from the main track and leave her on the side track somewhere. It is the hostler's business to take charge of that engine and to move her off, and — everything which is required until she is got into the house.

Q. To see that the engine is in good order to go out again?

A. That is not his business, but it is his business to take care of the engine while he has charge of her—to see that there is water in the boiler. He can use his own judgment about the fire; as long as he has steam enough to get into the house that is all that is required. If he should fail for steam he might find it necessary to fix up his fire and let more steam on.

Q. How long does it take from the time the hostler takes charge of an engine to fix it up and get around into the round-house?

A. I should judge on one of them engines they might take forty minutes. It might take a little longer, or less. Sometimes there is more trouble with the same thing than there is at other times.

Q. How many engines did they have to take care of there in one night?

A. I couldn't give it exactly; it used to range from six to twelve engines. Sometimes they might have no more than five or six and sometimes again ten or twelve.

Q. State how it was as to these helpers or Sutherland's being under control of the hostler as to his duties, or the hostler
152 being under the control of Sutherland as to his duties? Which,
if either, was under the control of the other as to their own duties?

A. Each man had his duties, and there wasn't any of them under the control of any other any further than their work is concerned, and they work together—that is, one man has just as much right to ask the hostler to move as the hostler would have to tell the other man to go and give her coal. They are to work together, and each one has his special work to do, and as long as each one attends to his work it don't need any further——

Q. And neither over the other?

(Objected to.)

Q. When you hired Sutherland what, if any, instructions did you give him as to his obeying, in his work, Lewis, the hostler?

A. I couldn't say that I gave him any instructions. I don't recollect that I did anything of the kind. I may have told the man that the hostler would tell him what he had to do, or something of that kind, but I couldn't say that I did or not. I make it my business, if I employ a man——

(Objected to.)

The Court:

Q. He asked you what you did in this particular instance.

A. I can't recollect in this particular instance.

Mr. Newbegin:

Q. You may tell what your habit was in employing men there.

(Objected to by plaintiff, by his counsel.)

The Court:

Q. He can give his general habit there as to instructing men as as to what they are to do.

(Excepted to by plaintiff, by his counsel.)

A. My usual way is, if I hire a new man, to put him to a certain work——

The Court: Confine it to these men.

Mr. NEWBEGIN:

Q. I want to know whether you gave these helpers, when you employed them, an opportunity to learn their business.

A. In hiring a new man I usually put him with a party he knows and tell him that that party will instruct him as to his work,
153 or else I leave him with somebody that is extra—an extra man, in addition to the usual force—to show him what the different persons' work in that job is.

Q. How was it as to Sutherland? Did he have an oppotunity to learn?

(Objected to as having been asked before.)

The COURT:

Q. It takes one hostler to two helpers to take care of the engine?

A. Yes, sir.

Q. Do you remember whether Moore was employed before Sutherland?

A. Yes, sir.

Q. You hired him with Moore, then?

A. Yes, sir.

Q. That is the usual custom as to directing him?

A. When he would be working with Moore and the hostler who had been there before, then I would expect those men to show him what he would have to do.

Mr. NEWBEGIN:

Q. But would you or did you place them under the control——

(Objected to.)

Mr. DOYLE: It depends upon what he said; I don't want his opinion.

Mr. NEWBEGIN:

Q. Did you use the word "obey" Lewis when you employed him to go to work there as a helper?

A. I would be unable to say whether I did or not.

Q. State whether you instructed Sutherland to obey the hostler.

A. Not that I can recollect of.

Q. Would you be likely to remember it if you did?

(Objected to and sustained.)

Q. Do you know why Lewis was taken back in the employment of the company?

(Objected to and sustained.)

Cross-examination by Mr. DOYLE:

Q. Did you hire Mr. Burge?

A. I think I had him in our employ at one time.

Q. Don't you remember that he was the man who took Sutherland's place the day after he was hurt?

A. I don't recollect him; I remember him; that I had him in employ, but I couldn't say what he did.

Q. You did hire somebody to take Sutherland's place?

154 A. I either did or put somebody else in who was there, but I can't recollect what change I made there.

Q. Do you recollect having a conversation with Mr. Brewbaker shortly after this in which you told him if the helpers didn't obey him to report to you?

A. I don't recollect that; I may have told him, but I don't recollect it.

Q. I understand you, then, that you don't remember what you said to Mr. Sutherland when you hired him?

A. I don't recollect all that I said to him.

Q. When you put a strange helper into what I will call, for the sake of naming it, the gang, consisting of the hostler and the two helpers, and you didn't give him any instructions, to whom would you usually refer him for instructions?

A. I would refer him to the parties working there at that work.

Q. And told him that they would instruct him?

A. That they would show him what he had to do; that they would post him on his work.

Q. Supposing the engine was under the chute all right to be coaled; the hostler had taken it down and got it all ready, and the helpers were there and not attending to their business; who would instruct them to go onto the chute and open up the chute?

A. I don't know as any of them would, any more than what one man would to another.

Q. Here is an engine under the coal-chute, and the hostler here has gone under the coal-chute; what would he tell the helpers?

A. I couldn't say what he would tell them.

Q. Why? Because you don't know?

A. I wouldn't know what he would tell them under such circumstances; if a man didn't attend to his business he would likely inform the proper officer.

Q. Who would?

155 A. Those other parties who were interested *that* have the work to do.

Q. All that it amounts to is that these men are each to report the other if they don't behave themselves right?

A. That is about the sum and substance of it.

(The defendant here rested its case.)

Plaintiff's Testimony in Rebuttal.

Plaintiff, further to maintain the issues on his behalf, and by way of rebuttal, called as a witness ALBERT BURGE.

Deposition of Albert Burge.

Direct examination by Mr. WALKER:

Q. State if you hea-d a conversation between Mr. Lewis and Mr.

Brewbaker at the sand-house, a few days after the return of Mr. Lewis to work after this injury, in which Mr. Lewis said anything about how this accident occurred.

A. I was there the same night with Mr. Brewbaker.

Q. Repeat to the jury just what he said about the accident.

A. I will just tell you how it happened.

Q. Tell what Lewis said.

A. Well he said that they had 212 at pocket 18—I think that was the pocket; it was one of the pockets anyway along the coal-chute. He said Mr. Moore had got up on the coal-chute to find some more coal, and he said there wasn't coal enough in the pocket they let down, and Moore climbed up to find more coal, and Billy was shutting the apron. He said he had the relief cups open and tried to shut them with his hands and couldn't, and he had his hand on the throttle and went to shut the relief cups with his foot, and the throttle went wide open, and he heard no signal until he
156 heard Sutherland say, "Pull ahead; you have got me catched."

Cross-examination:

Q. You were on the stand this morning?

A. Yes, sir.

Q. You testified that you were in the employ of the company?

A. Yes.

Q. How long since you ceased to be at work for them?

A. I worked for them about seven years. I am still working for them.

Q. What doing?

A. Paddying.

Q. Who were present, if anybody, when you heard that conversation?

A. Brewbaker and Ed. Lewis.

Q. Who all were present?

A. Just us three.

Q. In what place was that?

A. In the sand-house.

Q. Where is that sand-house located?

A. Right east of the coal-chutes, where the coal-chutes comes down to the sand-house.

Q. Were you inside of the sand-house?

A. Yes, sir.

Q. What time of the night was it?

A. As near as I could tell it was—it was after No. 4 had got in. I don't know what time she came in then; we didn't have any time card.

Q. Can't you tell us?

A. It was between the time we went to work until we quit. I didn't have any time-piece along and the sun wasn't up.

Q. You could tell between night and morning?

A. Oh, yes; when it gets daylight.

Q. Is that as near as you can tell when it was?

A. I didn't look.

Q. Is that as near as you can tell?

A. I might have told if I had had a watch, but I didn't have any time-piece to tell what time it was.

Q. Is that as near as you can tell?

A. It might have been towards eleven o'clock.

Q. What time did No. 4 get in then?

A. I don't know. I didn't pay much attention to train time.

Q. Don't you know what time No. 4 got in?

A. No, sir.

157 Q. Why did you allude to No. 4 then?

A. Because it was No. 4 train.

Q. What did you have to do there?

A. I took Sutherland's place and helped clean out the fire and put in sand and coal.

Q. How long after Sutherland was hurt?

A. It was about the 4th night after Lewis came back to work.

Q. Wasn't he off but three days?

A. He was off and he came back after they laid him off.

Q. How many weeks was it after he was hurt?

A. About 6 or 7 weeks.

Q. Was he then acting as hostler?

A. He was, sir.

Q. And you and Moore were his helpers?

A. No, sir; Johnny Brewbaker and me was his helpers then; Lewis took Brewbaker's place.

Q. Hadn't Lewis been day hostler at that time?

A. No, sir; he was laid off; they pulled him off.

Q. What was Lewis held off for?

A. For the accident he done.

Q. What accident?

A. For hurting Mr. Sutherland.

Q. No; but I mean Brewbaker; wasn't Brewbaker day hostler at that time?

A. No, sir; he was helping me at the chutes; Lewis took Johnny Brewbaker's place.

Q. Brewbaker was helper then?

A. He was helper with me that night when he told it.

Q. How long did he remain helper there?

A. I couldn't say how long. He was the helper there; he helped until they put Mr. Lewis in the yard running the yard engine; then Brewbaker took his place and they gave me a new man to help me.

Q. Which was the higher grade of work?

A. The hostler; they get more money.

Q. You three were there in the sand-house together?

A. We was, sir; that is where we always staid.

Q. Lewis and you and Brewbaker?

A. Yes, sir.

Q. How did this conversation come up?

A. Brewbaker asked Mr. Lewis to start upon —, and Lewis
158 said "Between us three, we are alone here, and I will tell you
how it occurred: We had the relief-cups open and I tried

to shut them with my hand and they wouldn't shut, and I went to take my foot to shut the relief-cups and I had my hand on the throttle and pulled her wide open."

Q. How high up would he have to put his foot to hit the lever?

A. He wouldn't have to put his foot more than so high to hit the lever. (Indicating his knees.)

Q. Where is the relief-cup rod?

A. It extends inside here; the rod is a little rod inside of the boiler and is attached right here; there is a spout on the relief-cup about that long and about an inch and a half round; the relief-cup bends over a little bit; Lewis went to shut them with his foot and had his hand on the throttle.

Q. How would Lewis go to work to shut it with his hand?

A. There is a big brass knob on the rod; it is fastened with a screw; there is room enough to put your hand on it.

Q. How do they generally use that rod?

A. They do it with their hand when they can, and when they can't they have to get out and go around and see what ails them; the knob is right on the relief-cup and extends about so far; this engine (the model) ain't like a mogul; the boiler of the mogul extends away out even with the frame here, and the top of the cab extends over, and the boiler runs across, and the reverse lever stands right up here, and the handle of the relief-cups stands right beside the boiler, just about so far inside of the cab.

Q. Where, with reference to the top of the boiler, is the knob which you operate?

A. It ain't on top; it is right beside of the boiler; it is just about half-way between the floor and the top of the boiler.

Q. It would come up to your breast then, wouldn't it?

159 A. No, sir; if you are standing on the floor the top of the boiler comes up about to here (illustrating on his breast).

Q. Did you ever stand in the cab of No. 212 to see how high it comes up?

A. No, sir; but the size of them is all alike.

Q. And you actually don't know how high that lever comes up in that engine?

A. I suppose there is no difference between them; they are all about in the same way—in the same form.

Mr. Doyle: We called this witness to prove what Lewis said, but this is not cross-examination.

The Court (to Mr. Newbegin): You make him your own witness, and you have closed your case; we will not rule out what you have got; we will let it go where it is.

Q. Mr. Newbegin: You can't swear, as a matter of fact, what time this conversation took place?

A. I told you about 11 o'clock, as near as I could tell.

Q. You can't swear, as a matter of fact, when this conversation took place—from the time that No. 4 got in until daylight?

A. Nobody could tell if he didn't have a watch to look at.

Q. I asked you whether you could.

A. I told you it was about 11 o'clock, as near as I could get at it.
Q. Are you shure it was about 11 o'clock?
A. I couldn't say.
Q. Are you sure it was earlier than five o'clock in the morning?
A. I know it wasn't five o'clock.
Q. How do you know?
A. It wasn't daylight, and it got daylight then at five o'clock.
Q. This was about six weeks after the injury, you say, to Sutherland, and it would be about the middle of March, then?
A. Lewis, he laid off six weeks, and it was the fourth night after he came back, which would make it six weeks and four days after the accident.
Q. It was about the middle of March, wasn't it?
A. I don't know what month he came back.
160 Q. Did it get daylight in the middle of March at 5 o'clock in the morning?
A. It does sometimes when it ain't cloudy.

Deposition of J. Brewbaker.

Plaintiff, further to maintain the issues on his behalf, and by way of rebuttal, called John Brewbaker, who, having been previously sworn, testified as follows:

Direct examination by Mr. Walker:

Q. You may tell the jury, if you remember, of having had a conversation with Mr. Lewis, the hostler, at the sand-house, about three or four nights after his return to work, after having laid off after the accident, some time in March, 1882, in the night, at which Mr. Albert Burge was present, in relation to this injury.
A. I don't remember of any conversation of that kind.
Q. Did you have any conversation with Mr. Lewis at any time along there in reference to this accident?

(Objected to by defendant, by its counsel, as not being the conversation referred to by the other witness.)

The Court: Call his attention to the time in which Lewis should have said so and so.
Mr. Walker: I prefer the witness should repeat it himself.
The Court: Confine it to that.

Q. Mr. Walker: Did you have any conversation with Mr. Lewis, or hear any conversation, in which he described the accident to Mr. Sutherland?

(Objected to.)

The Court: You can put the very words in his mouth if you wish.

Q. Were you in the sand-house, and heard such a conversation, when Burge was present?
A. I was not.

Q. Mr. WALKER: Tell the jury if you had a conversation with Mr. Lewis setting out, in substance, at this extent, that he had not
161 intended to move the engine at the time the accident occurred.

A. I do not remember any such conversation.

Q. You can't remember any such conversation?

A. No, sir.

Q. Did you have a conversation with him wherein he said that he had taken hold of the lever to shut the relief cups, and that they didn't shut right, and he took his foot to raise the bar or to enable him to raise the bar, and when he had hold of the reverse lever that his foot slipped and that threw the throttle open and she went back?

A. Not that I remember of; I don't remember of any such conversation.

Q. Didn't you tell Judge Doyle and myself?

(Objected to and sustained.)

Q. Mr. DOYLE: Do you say you have had no such conversation, the substance of which we have asked you?

A. I don't remember any such conversation.

Q. You say you don't remember that conversation?

A. I don't remember any such conversation; no, sir.

Plaintiff, further to maintain the issues on his behalf, himself, WILLIAM SUTHERLAND, further testified in rebuttal as follows:

Direct examination by Mr. DOYLE:

Q. Mr. Sutherland, I will ask you to state whether after this accident occurred and before you had been removed from the engine —before the engine started—Mr. Lewis asked you why you did it, and whether you replied "I don't know?"

A. No such question was asked.

Q. Or any such a thing occurred?

A. No, sir.

Q. I will ask you to state whether at any time during the day following the accident, or the morning, or that night, you said to Dr. Young that you didn't know how the accident occurred.

A. No, sir; I did not.

162 Q. State whether you ever said to Dr. Young at any time that you didn't know how the accident occurred.

A. No, sir; I didn't.

Q. State whether you ever said to Dr. Young at any time that you were sitting up on the top of the cab when you were hurt.

A. No, sir; I never spoke to Dr. Young about sitting on the top of the cab.

Q. State whether you had any conversation with Dr. Young in which your wife was not present.

A. My wife was present when Dr. Young was present there.

Q. The COURT: Every time?

A. My wife staid right there.

Q. When? He was there a good many times.

A. But this morning that he speaks of he was present and my wife was present.

Q. Mr. Doyle: You have already stated, if I recollect, on cross-examination, that you didn't give any signal that night.

A. I gave no signals at all.

Q. State whether you used the words "All right."

A. No, sir; I didn't.

Q. State whether you used the words "Back up."

A. No, sir; I didn't.

Q. I will ask you whether you ever said to Dr. Young that this was an accident and there was nobody to blame.

A. No, sir; I never said such a thing to him; I have always said that I was——

Q. No; that is nothing; I will give you Dr. Young's language: "I understood him to say he was sitting on the top of the cab with one foot down and his lantern on the top of the cab." Did you ever make such a statement as that to Dr. Young?

A. No, sir.

Cross-examination by Mr. Newbegin:

Q. Might you not have had a conversation with Dr. Young when your wife was not present?

A. No, sir; she staid right by me all the time, and my brother; she was present in the house all the time.

Q. In your immediate vicinity every moment that Dr. Young was present?

163 A. Yes, sir. She was present in the room every time that Dr. Young was dressing my wound, and my brother with her.

Plaintiff, further to maintain the issues on his behalf, and by way of rebuttal, called Mrs. Lotta Sutherland, who, having been previously sworn, testified as follows:

Direct examination by Mr. Doyle:

Q. How constantly were you in the room with your husband while Dr. Young was dressing his wound?

A. I was there and not out of the room any more than five minutes at a time.

Q. Were you out of the room at any time when he was dressing the wound or operating?

A. No, sir.

Q. State whether, in your presence, your husband made any statement to Dr. Young like this: that he didn't know how he was hurt?

A. No, sir.

Q. Or that it was an accident and no one to blame?

A. No, sir; he said no such thing.

Q. Or that he was sitting on the cab when he was hurt with one foot hanging down?

A. No, sir; he never said it.

Cross-examination by Mr. Newbegin:

Q. You don't pretend to say that Dr. Young was not there at some times when you were not present?

A. I was present all the time when he was there.

Q. How many rooms were there in your house?

A. Three rooms below. We didn't use the upstairs only just for sleeping. After he was hurt I didn't use the upstairs at all; my children were taken away and I had no occasion to go upstairs at all.

Q. What room was he in?

A. In the front room, right off the kitchen.

164 You did your own housework?

A. Yes, sir.

Q. Do you mean to say that during the six or eight weeks or three months that Dr. Young was attending him?

A. He didn't attend him but two months.

Q. Do you mean to say that during the two months Dr. Young was attending your husband, more or less, that he wasn't left alone with him so that he could have had conversation with him without your knowing what the conversation was all the time?

(Objected to by plaintiff, by his counsel.)

The Court: Confine yourself to that week.

A. Witness: I say he never saw the doctor but I was right in the room all the time he was there.

Q. Mr. Newbegin: So you could have heard all the conversation which passed between him and your husband?

A. Yes, sir.

Thereupon both the plaintiff and the defendant rested, and no other or further testimony was offered on the trial of the case by either party, the above and foregoing being all of the testimony before the jury on said trial.

The defendant, by its counsel, then requested the court to instruct the jury as follows:

"Under the testimony given in this case it is the duty of the jury to return a verdict for the defendant."

Which instruction the court refused to give; to which refusal the defendant, by its counsel, then and there excepted.

The defendant, by its counsel, also requested the court to instruct the jury as follows:

"If the jury find from the testimony that the injury was caused
by the negligence of the hostler, Lewis, then their verdict
165 should be for the defendant."

Which instruction the court refused to give; to which refusal the defendant, by its counsel, then and there excepted.

The defendant, by its counsel, also requested the court to instruct the jury as follows:

"If the jury find that the injuries complained of were received by the plaintiff in consequence of negligence on the part of Edward Lewis, the hostler, and that Lewis was an employee of the company, having authority over the plaintiff, they must also find, in order to hold the company responsible for such injury, that the negligence of Lewis was in the discharge of some duty in respect to which he was authorized to exercise authority over the plaintiff."

Which instruction the court refused to give; to which refusal the defendant, by its counsel, then and there excepted.

The defendant, by its counsel, also requested the court to instruct the jury as follows:

"The testimony on both sides shows that, so far as concerns the mere act of taking coal into the tender and moving the engine to and from the coal-chutes, in the performance of that service Lewis, the hostler, was not exercising control or authority over the plaintiff, and if the plaintiff suffered injury in consequence of the negligence of Lewis while they were employed in that service the company is not liable."

Which instruction the court refused to give; to which refusal the defendant, by its counsel, then and there excepted.

The defendant, by its counsel, also requested the court to instruct the jury as follows:

"The testimony given in behalf of both plaintiff and defendant shows that the respective duties of the hostler and his helpers 166 were clearly defined by their superior officers and were well understood by them all; that it was the duty of the helpers, without orders on the subject from the hostler, to attend to the coaling up and supplying water and sand to the engine before it was sent to the round-house; also to clean the ash-pan and ash-pit; that it was the duty of the hostler, under like instructions from his superior, to handle the engine and move it from point to point for the purpose of taking on sand, coal, and water, and having the ashes removed from the ash-pan. The mere fact, if such were the fact, that in moving the engine he might determine the order in which the supplies should be taken on did not make him the superior of the helpers or render the company liable to them for his negligence."

Which instruction the court refused to give, except as they may be covered by the charge as given; to which refusal the defendant, by its counsel, then and there excepted, and thereupon the court charged the jury as follows:

Charge of the Court.

GENTLEMEN: The plaintiff in this suit has brought his action to recover against the defendant, the Baltimore and Ohio Railroad Company, for damages which he alleges he sustained by reason of having his leg injured on the 31st of January, 1882, so as to make it necessary that his leg should be amputated.

He alleges in his petition that he was a common laborer employed by the company before that time to do and perform certain duties at Chicago Junction in helping to take care of the engines that came into that station during the night-time at that period of the year. It appears in the evidence, and it is alleged in the petition also, that

a man by the name of Lewis was the engineer in charge of
167 the engine in the handling of which the plaintiff claims he
was injured. And it is alleged in the petition that when the company employed him it was stipulated and agreed and directed by the party representing the company that he was to be placed under the control and the orders and subordinate to Lewis in the discharge of any duties he might be called upon to perform.

He alleges that, in discharge of these duties, this engineer, who is termed a hostler, was guilty of negligence and carelessness in backing up the locomotive at the coal-chutes, by which his leg was injured without any fault of himself. The carelessness and negligence of the defendant company is denied by the defendant in its answer. It also alleges, by way of defense, that whatever injury was sustained by the plaintiff on that occasion was the result of his own negligence and carelessness in the manner in which he undertook to discharge his duty. There is another defense which has not been insisted upon in this trial, and that is that the plaintiff belonged to an organization gotten up by the defendant company, by which persons under such circumstances were to be compensated through the assessment of dues, &c., but no evidence has been introduced on this defense, that will be entirely out of your consideration.

The plaintiff, then, in this suit, having alleged that the injury of which he complains was occasioned by the negligence and carelessness of the defendant, is bound to establish by a fair preponderance of the proof that the injury was the result of negligence and carelessness on behalf of the company, represented by this hostler, Lewis, as stated in the petition.

It is also necessary, in order to entitle the plaintiff to recover, that
— in evidence should show that this injury was not the result
168 of his own carelessness; that he did not by his own negli-
gence contribute to the injury. If it should appear in the testimony and the circumstances disclose that the injury was the result of his own negligence, then the plaintiff is not entitled to recover; or, as in this instance, where it is alleged by way of defense on behalf of the defendant that it was the result of his own negligence and carelessness, if the evidence by a preponderance shows to you under that defense that the plaintiff was guilty of carelessness and negligence in the performance of his duty on that occasion, then the law prevents him from recovering. The general principle of law is that where the plaintiff by his own negligence and carelessness contributes to his injury the law leaves him without any remedy, even though the other side—the defendant—may have been guilty of some carelessness in the manner in which it discharged its duty; for if a man brings an injury upon himself by his own conduct and carelessness and negligence, he ought not to be afforded a remedy against other parties connected with the transaction.

This defendant is a corporation; it acts necessarily thro' its agents and employés. It can do nothing itself only thro' the instrumentality of agents and employés used for the purpose of running its railroad and the machinery upon its railroad. It necessarily follows that the corporation itself can be guilty of no negligence only as it comes through and is committed by some of its agents or employés who have been placed in a position to represent the company itself. The charge in this case is negligence against the defendant, through its representative, as claimed by the plaintiff, *of* the defendant Lewis, the hostler on the engine.

169 Now it is important for you to understand, in the first place, what in the eye of the law constitutes negligence or carelessness that in an action like this authorizes the plaintiff to recover.

Negligence is the failure to do what a reasonably prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under existing circumstances would have done; so that, in a controversy between employés and a principal, the defendant in this suit would only be required to exercise what is called ordinary care in taking care of the safety of its employés. If the plaintiff in the action were a passenger upon a train of cars a much higher degree of care is required on behalf of the railroad to prevent accidents, but in this case the degree of care and diligence required is simply that of the ordinary care of a reasonably prudent man under like circumstances in business which he was engaged in transacting. Another thing: Carelessness and negligence are relative terms; what might be negligence under some circumstances and in one place may not be so under other circumstances and at another place.

Reasonable and proper care must always have reference to surrounding circumstances. Circumstances may often demand a higher or a lower degree of care and diligence of a party, and then negliglence often depends on the duty that may be required of a party charged with such negligence.

This occurrence took place in the night-time, and what not might not have been carelessness or negligence in the day-time might, under the circumstances of the darkness of the night, have been negligence and carelessness on behalf of either the plaintiff or the defendant in this suit; and, when you judge of the kind of negligence and carelessness, you are to treat the plaintiff and the defendant 170 alike; the same degree of care and diligence is required to be exercised by the plaintiff under like circumstances as you would require to be exercised by the defendant—ordinary care and diligence, such as an ordinary prudent man would exercise under like circumstances.

There are several other general principles of law which it is necessary for me to refer to in order to enable you to correctly decide this case. The law is that where an injury results to a party engaged in operating a railroad or any other general business, where the injury is caused by the negligence of a fellow-servant of the plaintiff or a colaborer with the plaintiff, he cannot recover damages for an injury occasioned by such a fellow-servant. That is upon the ground that by the terms of the employment—by the very relation that he bears to the employing party—he takes upon himself the risk of injury resulting from the carelessness of his fellow-servant or colaborer standing on an equality with him in the discharge of duties connected with the party who may be employing him.

A fellow-servant or a colaborer is one engaged in the same business and with the same duties, and to be performed together without any control of the one over the other and each acting independently of the other, and where a party receives an injury from a fellow-servant bearing this relation to him the law gives him no remedy against the co-employer on the ground that it is one of the risks and chances and liabilities that his contract covers and he has no right to make complaint. But if the injury is the result of the acts of one superior to him, and having a right to send and direct him and having control over him, and the injury results from the carelessness of his superior to him, then the law treats that superior
171 as representative of the defendant corporation, and entitles the employé to recover damages for an injury resulting from the carelessness of such party placed over him and under whose control and direction he may be placed. Now, in this case, if the hostler, Lewis, was the superior of the plaintiff at the time of the injury, having the control and direction of his actions, and was guilty of the negligence that caused the injury, then the defendant corporation behind him is liable for such negligence, and that, too, even though what the plaintiff was doing he had not been directly ordered by the hostler to do, and was doing the work as a part of his general duties, so that from these general principles of law, gentlemen, you will see it is important for you to determine as a question of fact what was the relation of Lewis, the hostler, to the plaintiff, who was said to be a helper engaged with him in something connected with the duties of each of them at the Junction on the occasion when the injury was sustained. Now, to determine the relation of the plaintiff and Lewis, you will examine carefully the evidence, and if you find from it that at the time the plaintiff was employed as a helper to the hostler he was to obey the directions and be under the oredrs of Lewis, the hostler, then Lewis would be the superior, and the master mechanic having control of that part of the business at the station had authority, representing his company, to make such a contract with the plaintiff, and by doing that to bind the company in establishing that relation between Lewis, the hostler, and the plaintiff in this suit. But if you find from the evidence that no such obedience was required or directed or agreed upon by the employment, and the plaintiff and Lewis were under the common control of either the fireman or
172 master mechanic at the Junction in the discharge of their several duties, then they were only fellow-servants, and the carelessness of Lewis would not make the defendant liable. So that you will, gentlemen, see that you must examine the evidence to ascertain the relation existing between these parties by the terms of his employment, for the plaintiff sets up in his petition, and it is incumbent upon him to show by a fair preponderance of the proof, that such was the relation, and that that relation was created at the time of the plaintiff's employment and existed at the time injuries resulted.

On that question there is testimony on both sides.

It is denies on behalf of the defendant, by its counsel, that any arrangement of that kind was made; that he was simply employed without any such specific arrangement between these parties, and the relation which he bore by the employment in the absence of such special arrangement made them colaborers and fellow-servants, so that the plaintiff would not be entitled to recover.

Evidence has been introduced on the part of the plaintiff to establish his version of the contract, and testimony on this point has been offered to show what took place and whether that was the contract of the hiring or employment or not. This is a question of fact, and it is a very important question of fact, for you to ascertain and determine at the very outset of your investigation into the transactions that occurred after this relation had been created between these parties.

If you find that this contract was not made between these parties, and if this plaintiff, with the other helper and hostler, were simply colaborers and fellow-servants together, then the law prevents the plaintiff from having any recovery for the injury which may
173 result from the carelessness or negligence of the fellow-servants or colaborers. The burden of proof is upon the plaintiff to establish and make out this relation.

Now, gentlemen, if you find that the relation of the plaintiff and this hostler was that of fellow-servants, and that the hostler was not the superior of the plaintiff as he was employed, then your labors in this case will terminate, because the law prevents the plaintiff from recovering damages for an injury resulting while they bore that relation to each other. But if you find that this relation of subordinate and superior did exist between the plaintiff and the hostler, Lewis, representing the company, then you will go one step further and make the further inquiry in order to ascertain whether Lewis, the hostler, was guilty of negligence and carelessness on that occasion, and, still further, whether the plaintiff, in the manner in which he discharged his duties, was guilty himself of negligence or carelessness in the manner in which he undertook to discharge them and brought the injury upon himself. It therefore will be important for you to examine into the fact and see whose fault it was that this injury resulted to this plaintiff.

Was it the negligence and carelessness of Lewis, the hostler, or the carelessness of the plaintiff in the manner in which he did his duty? And to ascertain that question it is important for you to find out who had the direction and control between the plaintiff and the hostler, Lewis, of the moving of the engine. It is conceded on both sides that Lewis was the engineer who manipulated the engine so as to move it backward and forward on the track, but it is claimed on behalf of the defendant that the plaintiff and his co-
174 laborer, Moore, had the authority and it was their duty to direct when that engine should be moved and where it should be taken. Now, that makes it exceedingly important, gentlemen, for you to look into the evidence and ascertain the duties to be performed by the plaintiff, the duties to be performed by Lewis, the

duties which were to be performed by the other helper, Moore, and to see and determine from these several duties who was negligent, for, as I said before, duty has very much do with the question of negligence and carelessness. Whose duty, then, was it to direct and control the movements of this locomotive? These movements took place in the night—in the darkness of the night. Where was the engineer or the hostler on the locomotive who had control of it? It is claimed that the plaintiff was there engaged in letting down the coal out of the chute into the tender and that he had control of that end of the operation and work. It is claimed on behalf of the defendant that the plaintiff himself gave the notice and the signal for the movement of this engine which resulted in mashing his leg and making amputation necessary.

It is in the first place important for you to find out who had this direction and that you must gather from the evidence which you have heard during the trial of this case. Then it is important to ascertain whether the signal was given the engineer or hostler to move up that engine on that occasion, and, if it was given, by whom was it given? If it was not given, then it is important to know whether the hostler moved up in the darkness of the night and ran against the apron—which was then let down—the engine by which this injury is said to have been occasioned.

If it was the duty of the plaintiff to give the signal for
175 the moving of that engine to the hostler, and he did give it,
being at the place of danger, having control of the opening of the chute, and not having shut it up, and if he gave the order to back up, or "All right," or anything by which Lewis was led to think it was proper and right to back up the engine, then it can hardly be said that the fault of moving the engine was upon Lewis himself in obeying the signal given by the plaintiff; but, if the plaintiff did not give the signal, and Lewis in the darkness of the night, in a position where he could not know whether the plaintiff was in danger or not, nor where the plaintiff was, knowing that he was in the immediate neighborhood of the chute, if he moved it up without any signal that led him to suppose that the thing was all right and there was no danger, then it would be carelessness on behalf of Lewis, the hostler, to have thus moved up the engine by which the injury resulted to plaintiff.

And another thing: If the hostler was to move the engine in taking coal under the direction of the helpers—both of the helpers—there were two of them who attended to the putting of the coal into the tender—and Moore, the other helper, carelessly and improperly ordering the moving of the engine, and the hostler, Lewis, did so as directed, without knowing it was dangerous to the plaintiff under the circumstances to do so, then it would not be carelessness in the moving, by the hostler having control of the engine, but that of the helper, Moore, who made the signal, and if the injury resulted therefrom the defendant corporation would not be liable, because it cannot be denied that the two helpers were fellow-servants and common laborers performing about the same duty, and then it would

176 be the carelessness of a fellow-servant and colaborer, and the defendant company would not be liable for it; but, if Lewis knew at the time he backed that engine that it was dangerous to do so, in regard to the plaintiff engaged in the work that he was doing at the time, and had any means of knowing by observation that it would be dangerous, then it would be carelessness on behalf of Lewis to have thus moved up the engine.

These are, gentlemen, about all the principles of law that are involved in this case. Most of the case are questions of fact as to the authority of the hostler over the plaintiff, as to the relation existing between them, and as to whose fault it was; and these are questions which you must determine in the light of the proof which you have heard and from the evidence in the trial of the case.

Now, it is a matter of fact that there often is a great deal of conflict in testimony in regard to any given fact that is sought to be established in court. Witnesses tell different stories and sometimes witnesses do not always tell the truth. It is the business of the jury in the trial of a case where there are questions of fact involved to carefully consider all of the testimony and from that to ascertain and determine the truth between conflicts of testimony. It is your purpose, it is your duty, to find out between this plaintiff and the defendant the exact truth in regard to this transaction, as far as possible, from the evidence that you have heard during the investigation.

In order to enable the jury to determine the weight of evidence, the reliability of evidence, and in order to determine and find out the truth between the conflicting evidence of witnesses the law has wisely laid down several tests of credibility which it is well 177 to apply in order to find out and judge of the credibility of witnesses in a case involving questions of fact.

The witnesses here all appear before you, and the manner of the witnesses on the stand, the intelligence with which he may testify, and the manner in which he may deliver his testimony have a good deal to do with his credibility in the statements which he may make, and the jury will carefully scrutinize the manner of the witnesses on the stand.

In the next place, it is well to consider the interest which the witness may have in the result of the controversy, the bias or prejudice that he may evince during his examination in favor of or against one side of the controversy, and the feelings or the prejudice that the witness may have in regard to the controversy, for we all know that, more or less, these feelings of humanity have sometimes something to do with the statements of witnesses. Prejudice, bias, bad feelings, interest involved in the controversy are all things to be considered by jurors in determining the weight of evidence of witnesses testifying before you; then, as I said, the intelligence of the witness, the knowledge that he seems to have of the transaction, of his means of knowing the facts about which he testifies. Then there is another good test, and that is the probability and reasonableness of the statement made by the witness—whether his statement would show a transaction which is in the ordinary experience

of us all in respect to what was reasonable and liable to have taken place between the parties. If an unreasonable and an improbable story is told by a witness, it has much to do with his credibility, and much corroboration might be required for a jury to be-
178 lieve an improbable story told by a witness.

Then, in the next place, another test is, is the witness contradicted or corroborated by other testimony that has been presented during the trial of a case, or has he made other statements outside of the court which contradicts the statements of his testimony made on the trial of the case—whether he has detailed and made other statements to witnesses who have testified before in relation to the same facts in a different way? Has he sworn differently on any other occasion about the same state of facts? These are tests which you are to look into for the purpose of ascertaining the credibility of witnesses.

Then, if any testimony is introduced for the purpose of showing the general character of the witness, that is one mode of determining credibility. No such testimony has been presented on either side concerning the witnesses in this case, and you are to presume that all of these witnesses that appeared here are witnesses of good character, and to judge of their truth by the tests which I have laid down for you.

Now, if you find, gentlemen, that this relation of superior and subordinate was not created between these parties, and that they were but fellow-servants, then your verdict will have to be for the defendant. If you find, also, that the plaintiff himself was guilty of contributory negligence, and by the manner in which he discharged his duty on that occasion did not exercise ordinary care and diligence in the performance of that duty, and for the want of it injury resulted to him, still the plaintiff cannot recover in this action. But if you find that he did not contribute, and if you find that this relation did exist between the parties, and the injury was the result of the carelessness and the negligence of the hostler
179 Lewis, then this plaintiff is entitled to recover a compensation for the injury that he has sustained.

Now, as to compensation, if you find for the plaintiff, it is a matter entirely within your control. This plaintiff is entitled to be compensated, if he is entitled to recover in this suit, for the injury that he has sustained of a permanent character, as well as the pain and suffering, and the expenses incurred by him during the time when he was sick and unable to do anything and while he was under the influence of the amputation of the leg.

I can give you no rule upon that subject. You are to be the judges of it, and the compensation should be a reasonable one under the circumstances, taking into consideration all of the circumstances surrounding the case, and such as would make this plaintiff a fair and reasonable compensation for the injury which he has sustained, and with that general rule you are to apply the evidence, and you are to be the judges of the amount of recovery if the plaintiff is entitled to recover anything.

The defendant then and there excepted to the charge above given in the form above given.

The defendant, by its counsel, also, thereupon, then and there excepted to so much of said charge as reads as follows: "It is alleged in the petition that when the company employed him it was stipulated and agreed and directed by the party representing the company that he was to be placed under the control and the orders and subordinate to Lewis in the discharge of any duties he might be called upon to perform."

180 And thereupon the defendant, by its counsel, prayed the court to allow, sign, and seal this bill of exceptions, which is now done accordingly, and upon its motion the same is ordered to be made part of the record in said case.

M. WELKER, [SEAL.]
Judge of said Court.

And afterwards, to wit, on the 3rd day of December, A. D. 1885, being a day of the December term, A. D. 1885, of said court, the following judgment was rendered in said cause in said court, viz:

Judgment.

WILLIAM SUTHERLAND
vs.
THE BALTIMORE & OHIO R. R. CO. } Law No. 337.

This day came the parties, by their counsel, and came on to be heard the defendant's motion to set aside the verdict rendered herein at the December term, A. D. 1884, of this court, and for a new trial, and thereupon, upon consideration, it is ordered that said motion be overruled, to which action and order of the court defendant excepts; and thereupon, upon motion of plaintiff, it is considered that the plaintiff have and recover from the Baltimore and Ohio Railroad Company, defendant, the sum of eight thousand five hundred dollars, his damages assessed by the jury at the aforesaid term of court, together with the costs of this suit, to be taxed at $ —, to which judgment and order of the court defendant excepts.

And afterwards, to wit, on the 8th day of December, A. D. 1885, the following bond was filed in this cause in said court, viz:

181 Circuit Court of the United States within and for the Northern District of Ohio, Western Division.

WILLIAM SUTHERLAND
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

Know all men by these presents that we, the Baltimore and Ohio Railroad Company, Henry Newbegin, and Benjamin S. Abell, are held and firmly bound unto William Sutherland, of said northern district of Ohio, in the penal sum of eighteen thousand dollars ($18,000.00), to be paid to the said William Sutherland, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this eighth day of December, A. D. 1885.

Whereas the above-named, The Baltimore and Ohio Railroad Company, has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the said circuit court of the United States for the northern district of Ohio at its December term, A. D. 1885:

182 Now, therefore the condition of this obligation is such that if the above-named The Baltimore and Ohio Railroad Company shall prosecute its writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE BALTIMORE & OHIO
RAILROAD COMPANY,
By HENRY NEWBEGIN, *Its Attorney*. [SEAL.]
HENRY NEWBEGIN. [SEAL.]
BENJ. S. ABELL. [SEAL.]

Sealed and delivered in the presence of—
ANDREW SAUER.

Filed November 8th, 1885.

A. J. RICKS, *Clerk*.

183 *Certificate*.

UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division, } *ss:*

I, Augustus J. Ricks, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein William Sutherland is plaintiff and the Baltimore and Ohio Railroad Company is the defendant, as the same appears from the files and records of said court now remaining in my custody.

In witness whereof I have hereunto set my hand and affixed the seal of said court at my office in Toledo, in said district, this 26th day of April, A. D. 1886, and in the 111th year of the Independence of the United States of America.

[Seal of the Circuit Court, North'n Dist. of Ohio.]

AUGUSTUS J. RICKS, *Clerk*.

Endorsed on cover: N. Ohio C. C. U. S. No. 926. The Baltimore and Ohio Railroad Company, plaintiff in error, *vs.* William Sutherland. Filed June 23, 1886.

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1888.

No. 294.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
PLAINTIFF IN ERROR,

VS.

WILLIAM SUTHERLAND, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE
UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN K. COWEN, } *Attorneys for*
HUGH L. BOND, JR. } *Plaintiff in Error.*

THE BALTIMORE & OHIO RAILROAD COMPANY,
Plaintiff-in-Error,

vs.

WILLIAM SUTHERLAND,
Defendant-in-Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 294.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is an action for personal injuries received by William Sutherland, defendant-in-error, while employed in the service of the plaintiff-in error, in its yard at Chicago Junction, Ohio. Sutherland was engaged, in the course of his employment, in supplying a locomotive with coal, between one and two o'clock in the morning of January 31st, 1882, when the locomotive backed and crushed his leg between the top of the cab and the apron of the coal chute. The accident was caused by the negligence of one Lewis, another employee, who had charge of the locomotive, and who moved it before receiving from Sutherland the signal to do so. Lewis was called a "hostler," and Sutherland was called a "helper" or "tender."

As to Sutherland's employment, and the respective duties of Lewis and himself, the testimony is as follows:

Sutherland's testimony on direct examination:

"I was employed as tender—tending engines—by Mr. Gunther, Master Mechanic of the shops at Chicago Junction, and head overseer of the shops and round-house. Gunther hired and discharged the employees that worked at the round-house, and he hired witness as a tender to tend the engines, and Edward Lewis was hostler, and that witness should work under Lewis. Mr. Gunther employed the hostler. The hostler's duty was to take charge of the engine after it was delivered in, and the engineer stepped off, and to give it necessaries, coal, &c. The hostler told the tender whatever he wanted. As the engine comes in off the road it requires coal and sand and fuel and water. This engine that witness was injured on had just been coaled. They had just got on the engine, and the hostler moved it to the number they were to get it coaled." (Record, pages 22 to 25 inclusive).

Q. Before going to that I will ask you what about your employment by Mr. Gunther; you may tell the jury what you were employed to do.

A. I was employed as a tender, to tend the engines, and Edward Lewis was the hostler.

Q. You may tell the jury what Mr. Gunther said to you, if anything, that you would have to do.

A. I had to work under Mr. Lewis, the hostler.

Q. He said that you would work under Mr. Lewis, the hostler?

A. Yes, sir. (Record, page 26).

On cross examination:

"Was employed in 1881 by Mr. Gunther as a laborer on the day crew, principally in cleaning the ash-pits. Did assist some in coaling for this same hostler, Mr. Lewis. In 1882, James Moore was employed as helper with witness on the night crew." (Record, pp. 31, 32 and 33).

Q. Was it your business to go there and assist in coaling these engines without being called especially to it by any person, as soon as they came in?

A. The hostler took charge of the engine.

Q. What I ask you is, as soon as the engine came in, were you keeping watch for it, and did you go to help coal it?

A. Yes, sir.

Q. As a matter of course that was your businsss?

A. Yes, that was my business.

Q. Just as soon as the hostler went and took charge of the engine, you went to aid in coaling?

A. Yes, sir.

Q. And didn't require to be called for that by anybody—it was your duty to do it?

A. Yes, sir.

Q. You went and coaled this engine the same as any other?

A. Yes, sir.

Q. You got upon the tender of the engine?

A. Yes, sir.

Q. And the engineer or the hostler placed it at its proper situation to take coal?

A. Yes; alongside of the apron, No. 11 pocket.

Q. And the engine ran up there, and it was your duty to keep watch of it?

A. Yes, sir.

Q. The hostler, whoever he is, takes the engine to its place, and you get upon the engine immediately as it comes in its place, and you pull out the pin and take the apron down and let the coal down?

A. Yes, sir.

Q. That is your business?

A. Yes, sir.

Q. And it is the business of the hostler to put it in place?

A. Yes, sir.

Q. When you would get through you would tell him it was all right, and to start up?

A. Yes.

Q. It is your business to tell the hostler to start up when you are through?

A. Yes; when the apron is put up.

* * * * * * *

Q. It was the hostler's business to attend to his engine; he was not expected to watch you?

A. No, sir; I had to do my work and he—

Q. And he had to do his?

A. Yes, sir.

* * * * * * *

Q. But it is his duty to wait, before he starts the engine, for the signal?

A. Yes, sir.

Q. You are quite sure of that?

A. Yes, I am positive of that: we had to get the apron in its proper place.

Q. And then it was as much your duty to give him the signal to start as it is his duty to wait for it?

A. Yes. (Record, pages 34, 35 and 36).

"Besides Mr. Gunther, there was a foreman there in the shops, Mr. Kimmer. I suppose if he ordered me to do anything I would have to do it, but Mr. Gunther hired me." (Record, page 40).

Q. Didn't you know that you were engaged in a business that was liable to accidents?

A. In railroad employment, of course, there is more or less accidents.

Q. And you knew, did you not, that that very work you were doing required extreme care to avoid accidents?

A. Yes; all railroad work must require care.

Q. You realized it, did you not, Mr. Sutherland?

A. I would be injured, of course, if the persons wouldn't be careful. (Page 39).

On re-direct examination.

Q. State whether you had any right to direct the movements of that engine.

A. Not until I got the apron and everything in its proper place, so that there would be no danger for her to move.

Q. Then what was it your duty to do?

A. I would tell him it was all right.

Q. Had you any other duty except that in reference to that engine, as to ordering the hostler?

A. No, sir. (Record, page 43).

John Brewbaker, a witness for Sutherland, testified:

On direct examination. "Witness' business was that of hostler. Two helpers and one hostler are on duty at the same time. The duty of the hostler is to take charge of the engine, to handle the engines and to tell his men what he wanted them to do. Don't know as that is the proper way to explain it. His duty would be to take charge of the engine and see that the engine is all right, and then say to his helpers, 'We will go up and take water.' He is called the hostler because he takes care of the iron horse and handles it. Suppose we have got an engine here. I take charge of this engine. I say to my helpers, 'We will go down and take coal first.' I am running the engine. Well, they tell me what pocket to go to for such an amount of coal. Then I move the engine down to the pocket he told me to set the engine at, and then, of course, the helpers—the two men that give the supplies—pull down the apron and take out the pin which holds the lever up, knock the lever down, and that lets the pocket open, and the coal being in there, pulls the pocket right open, and then they have that pocket to shut. If more coal is needed the helper again tells what pocket to go to." (Record, pages 49 and 50).

Q. You may tell the jury under whose orders the helper or tender is in doing this work.

A. Well, they are under the hostler's orders.

Q. State who was the general employer of the men who controls the general business there at that station.

A. F. J. Gunther in 1882, at the time of this injury. (Record, page 52).

On cross-examination. "While the helper was filling the tender of the engine with coal, the hostler would be inside the cab waiting for the signal or to be told where to go to get more coal, provided they wanted it. If there wasn't coal enough in that pocket, he would have to go to such other pocket as the helper told him to. It was his business to go where the workmen directed him as to getting coal." (Record, page 57).

"It is the business of these workmen to give coal, sand and water, and knock out the fire and clean the ash-pan. They do that as a matter of course. I don't have to tell them each time I want water, 'We will go and take water,' and each time I want coal, 'You must go with me to get coal,' and each time to clean out the ash-pan, 'Now we will clean out the ash-pan,'—I don't have to, because that is their duty, as a matter of course. It is just as must their duty to do that as it is for me to take charge of the engine and clean it up. So when the engine comes in, and after it is left by the engineer who has been running it on the road, all that the hostler has to do is to go and take that engine and see that it is in repair; see that it is furnished with water and fuel, and then take it back into the round-house; and it is the duty of these two men, or one of them, to have the coal supplied, to know where they are to get it, and it is their duty to inform the hostler where he is to get this coal. The pockets are filled by the helpers or tenders, in the daytime the same men who supply the coal to the engines, but not at night. It is the night men's business to know where the coal is, and to inform the hostler. It is also their business to get on to the engine with him and go right along with him to get the coal and water, as a matter of course." (Record, page 58).

James Moore, a witness for Sutherland, testified:

On direct examination. "Was acting as helper with Sutherland the night he was hurt. The duty of a helper is to help the engine to coal and water, and clean out the fire. In the performance of his duty, the helper is bound to obey the hostler." (Record, pages 59 and 60).

On cross-examination. "Had worked with Sutherland a couple of weeks, all the time he had been at work that winter. During this time had been in the habit of climbing up to shut the pockets as he did that night. Didn't go up by anybody's special order. Was not told at any particular time to climb up there and shut the pockets. Considered it his business, as a matter of course, to shut the pockets without any orders. It was Sutherland's business to shut that pocket without any special orders. Was left free, so far as the hostler was concerned, to go up and shut the pocket in any way he could. So far as he knew, there wasn't any special order given to Sutherland that night by Lewis to get up there and shut that pocket. Didn't hear any such order given. During all the time he was at work there, did not remember that he was specially ordered to shut the pocket, or directed in the manner in which he should shut it by the hostler. (Record, pages 60 and 61).

When Sutherland was hurt, witness was on top of the chute where he had gone to find more coal. The hostler did not send him up there. Went up there because that was a part of his very business. That was a part of the workmen's business without any special order, as a matter of course. It was witness' business to tell the hostler where the coal could be taken, or else to take it from such chutes as witness chose. It was witness' business to help put the coal into the engine, to help about filling the tender with water, and to get sand. As a matter of course, when an engine came in there and was left by the driver, witness got right on to it and went right along with the hostler in this business. The hostler didn't call him specially to go and do it. It was the helper's business to go and do it, and it was the hostler's business to handle the engine, and that is about all there was in the work. The helpers did their part and the hostler did his part. (Record, pages 61 and 62.).

The helpers' used always to tell the hostler when they got through taking coal and were ready to start. (Record, page 63).

Albert Burdge, a witness for Sutherland, testified in chief, that he was employed by Mr. Gunther in Sutherland's place after the latter was hurt, and that Mr. Gunther said he (witness) should obey the hostler. (Record, page 64).

(This testimony was admitted against defendant's objection, and exception taken).

Wm. Bramley, a witness for the Railroad Company, testified:

(In chief). He was night foreman in charge of the yard at the time Sutherland was hurt; had charge of every man that night who was employed in the machinery department, including Sutherland. The latter was tending engines, and his duties were to coal up engines, give them water and sand, and clean out the fires. Sutherland had two other men with him—Jas. Moore and Ed. Lewis. Lewis was hostler; Sutherland was acting under the special orders of no one, except witness and Mr. Gunther. Nobody had the right to give Sutherland orders except witness, unless Mr. Gunther, who was general foreman, saw fit to overrule witness. (Record, pages 87 and 88).

Lewis, the hostler, was one of the men subject to the orders of witness. The latter placed neither Sutherland nor Lewis under the orders, one of the other, or of anybody else. The hostler and the helpers were all about their regular business that night, as ordinarily. (Record, page 89).

(On cross-examination). Mr. Gunther hired the men. Witness did not remember instructing Lewis, Sutherland and Moore as to their duties. They were in the service when he took charge. (Pages 92 and 95). The tenders have as much right to direct the hostler as the hostler has to direct the tenders, and *vice versa.* Both are subject to the foreman, and neither is subject to the orders of the other. (Page 96).

Edward Lewis, a witness for the Railroad Company, testified (in chief): He was the hostler in charge of the engine the night Sutherland was hurt. Moore, Sutherland and witness all walked down from the round-house together, and got on to the engine Moore told witness to go to No. 11 pocket. After emptying that pocket they needed twenty to twenty-five bushels more coal. Moore got on top the chute to find a pocket to fill the tank. He came back and reported that No. 8 pocket had about what they wanted. Witness waited till he received a signal, "All right," from Sutherland, and then started to back to No. 8. (Page 99.) It was witness' business to move the engine after a signal from either helper. (Page 101.)

Witness was that night under nobody's immediate direction, but was working as he always did work. Mr. Bramley was foreman. Witness went by Sutherland's orders the same as he did by any other man's. As long as Sutherland was working on the coal chutes, and tending the engines, witness went by his signals. Witness knew nothing of Sutherland being placed under his control. Had no instructions of that kind at all; was holstlering, and wasn't boss. (Page 103.)

(On cross-examination): Witness' whole duty was to look after the engine. When an engine came in it was his duty to get on to it, and move it, when he got the signal. No special instructions were given him, and he gave no special instructions to anybody else—he had no right to do so. (Page 109.)

F. J. Gunther, a witness for the Railroad Company, testified (in chief): He was general foreman, in charge of the machine shops. Employed Sutherland to work at the shop at night.

(Page 112.) Sutherland's business was to go along with the engine from the time they started at the chutes to take coal, to help at that, and to help take water and sand. In addition, what time they had, they were to keep the sand dry in the sand-house. Lewis was the hostler, and he too was under the control of witness The hostler's duty was to take charge of the engine from the time she was left by the engineer. It was the engineman's business to bring the engine in to some point on the coal-chute track. It is the hostler's business to take charge of that engine and move her off, and everything which is required until she is got into the house. It is not the hostler's business to see that she is in good order to go out again; but it is his business to take care of the engine while he has charge of her—to see that there is water in the boiler. He can use his own judgment about the fire. —as long as she has steam enough to get into the house. (Page 113.)

Each man had his duties, and there wasn't any of them under the control of any other any further than their work was concerned, and they worked together, that is, one man had just as much right to ask the hostler to move as the hostler had to tell the other man to go and give her coal. They were to work together, and each one had his special work to do, and as long as each one attended to his work it didn't need anything further. Couldn't say that he gave Sutherland any instructions when he hired the latter. Didn't remember anything of the kind. May have told the man that the hostler would tell him what he had to do, or something of that kind, but couldn't say that he (witness) did or not. (Page 114.)

(On cross examination): When witness put a strange helper into the gang, he would refer the latter to the parties working there at that work, and say that they would show him what he had to do—that they would post him on his work. (Page 116.)

We believe the foregoing is a complete abstract of all the testimony bearing on the nature of Sutherland's employment, the circumstances under which he was employed, and his relations in his employment to Lewis, the hostler. The Record contains all the testimony offered by either party, or before the jury on the trial. (See page 123.)

On this testimony the Railroad Company asked for five instructions to the jury, in effect as follows:

1. That under the testimony the plaintiff could not recover. (Page 123).

2. That if the jury found that the injury was caused by the negligence of Lewis, the hostler, the plaintiff could not recover. (Page 123).

3. That, although the plaintiff's injury were caused by the negligence of Lewis, and Lewis were an employee having authority over the plaintiff, yet the plaintiff could not recover unless "the negligence of Lewis was in the discharge of some duty, in respect to which he was authorized to exercise authority over the plaintiff." (Page 124).

4. That the testimony on both sides showed that in the service of taking coal into the tender, and moving the engine to and from the chutes, Lewis was not exercising control or authority over the plaintiff, and the plaintiff could not recover for injuries received through the negligence of Lewis while both were employed in that service. (Page 124).

5. That the mere fact that in moving the engine, the hostler might determine the order in which the supplies should be taken on, did not make him the superior of the helpers, or render the company liable to them for his negligence. (Page 124).

The Court refused to give the first four instructions asked, and also the fifth, except as covered by the charge given, and thereupon proceed to give the charge found in the Record on pages 124 to 131 inclusive. The instructions of the charge on the question whether Sutherland and Lewis were fellow servants will be found in the first half of page 125, in the last paragraph on page 126, the whole of page 127, and the first half of page 128.

The Court's charge in effect leaves it to the jury to find whether the plaintiff and Lewis were fellow servants, or whether Lewis was the superior of the plaintiff, so as to make the former the representative of the Comprny, for whose negligence it would be responsible to the plaintiff.

To enable the jury to decide whether Lewis was such superior of the plaintiff, the charge (page 127) instructs them as follows:

"A fellow servant or a co-laborer is one engaged in the same business and *with the same duties, and to be performed together without any control of the one over the other and each acting independently of the other*, and where a party receives an injury from a fellow servant bearing this relation to him the law gives him no remedy against the co-employer on the ground that it is one of the risks and chances and liabilities that his contract covers and he has no right to make complaint. But if the injury is the result of the acts of *one superior to him, and having a right to send and direct him and having control over him*, and the injury results from the carelessness of his superior to him, then the law treats that superior as representative of the defendant corporation, and entitles the employee to recover damages for an injury resulting from the carelessness of such party placed over him and under whose control and direction he may be placed. Now, in this case, if the hostler, Lewis, was the *superior of the plaintiff* at the time of the injury, *having control and direction of his actions*, and was guilty of the negligence that caused the injury, then the defendant corporation behind him is liable for such negligence, and that, too, even though what the plaintiff was doing he had not been directly ordered by the hostler to do and was doing the work as a part of his general duties, so that from these general principles of law, gentlemen, you will see it is important for you to determine as a question of fact what was the relation of Lewis, the hostler, to the plaintiff."

The Court below, in its charge, further instructed the jury as to how they were to determine whether Lewis was a superior of Sutherland, as follows:

"Now to determine the relation of the plaintiff and Lewis you will examine carefully the evidence, and if you find from it that at the time plaintiff was employed as a helper to the hostler he was to obey the directions and be under the orders of Lewis, the hostler, then Lewis would be the superior, and the master mechanic having control of that part of the business at the station had authority, representing his company, to make such a contract with the plaintiff, and by doing that to bind the company in establishing that relation between Lewis, the hostler, and the plaintiff in this suit. But if you find from the evidence that no such obedience was *required or directed or agreed upon* by the employment, and the plaintiff and Lewis were under the common control of either the fireman or master mechanic at the junction, in the discharge of their respective duties, then they were only fellow servants and the carelessness of Lewis would not make the defendant liable. So that you will, gentlemen, see that you must examine the evidence to ascertain the relation existing between these parties by the terms of his employment, for the plaintiff sets up in his petition, and it is incumbent upon him to show by fair preponderance of the proof, that such was the relation, and that that relation was created at the time of the plaintiff's employment and existed at the time the injuries resulted." (Page 127). "On that question there is testimony on both sides. It is denied on behalf of the defendant by its counsel, that any arrangement of that kind was made; that he was simply employed without any such specific arrangement between these parties, and the relation which he bore by the employment, in the absence of such special arrangement, made them co laborers and fellow servants, so that the plaintiff would not be entitled to recover."

"Evidence has been introduced on the part of the plaintiff to establish his version of the contract. And testimony on this point has been offered to show what took place, and whether that was the contract of the hiring or employment or not. This is a question of fact, and it is a very important question of fact for you to ascertain and determine, at the very outset of your investigation into the transactions that occurred after this relation had been created between these parties." (Page 128).

The defendant by its counsel excepted to the Court's refusal to grant each of the instructions prayed by it (pages 123-124); and further excepted to the charge of the Court in the form given; and also excepted to so much of said charge (page 125) as reads as follows:

> "It is alleged in the petition that when the company employed him it was stipulated and agreed and directed by the party representing the company that he was to be placed under the control and the orders and subordinate to Lewis in the discharge of any duties he might be called upon to perform." (Page 132.)

There was a verdict in favor of plaintiff for $8,500. The defendant's motion to set the verdict aside, and for a new trial, was overruled and judgment entered for plaintiff for the amount of the verdict (page 132). To reverse this judgment the present writ of error was sued out.

ASSIGNMENTS OF ERROR.

The plaintiff in error assigns error in the action of the Court below:

1. That the Court erred in refusing each of the instructions prayed by the defendant in error through its counsel.

2. That the Court erred in its charge to the jury in that its charge stated incorrectly the law of master and servant as applicable to the case; that it left to the jury questions of law which should have been decided by the Court; that it stated facts not in evidence, and misled the jury as to the effect of the evidence.

ARGUMENT.

The Court's Charge Mis-stated the Effect of the Evidence.

The evidence on both sides shows that both Sutherland and Lewis were employees in the machinery department, hired by the same master mechanic—Gunther, and under the supervision of the same foreman—Bramley.

Lewis, Sutherland and Moore were together engaged in supplying a locomotive with coal for the next day's run. The testimony of Sutherland himself and of every witness for plaintiff, on cross examination, shows that there was no relation of superior and subordinate between the "hostler" on the one hand and the "tenders" on the other. Indeed, in the matter of taking coal, the "hostler" took his orders from the "tenders." About the actual conduct of the business there is no conflict of testimony. True, Sutherland and some of his witnesses do state, when examined in chief, that the "tenders" must obey the "hostler," but the testimony of each of them, on cross examination, shows that all work together in attaining a common object, first one and then the other taking the initiative. The very act of negligence on which this suit is based consisted in the movement of the locomotive by Lewis, *without waiting for the order from Sutherland.*

On the evidence, it was the Court's duty to decide as a matter of law that the Railroad Company was not responsible to Sutherland for the negligence of Lewis

But the defendant in-error contends that in this case the question of whether the relation of superior and subordinate existed between Lewis and Sutherland, is not to be determined from the nature of their respective duties, but that the question is settled by an alleged contract of employment made between Sutherland and Gunther at the time the latter hired the former.

It appears that Sutherland had worked as a tender the winter before with this same Lewis as hostler. Sutherland testifies (page 26), "I was employed as a tender to tend the engines, and Edward Lewis was the hostler."

Q. You may tell the jury what Mr. Gunther said to you, if anything, that you would have to do.

A. I had to work under Mr. Lewis, the hostler.

Q. He said to you that you would work under Mr. Lewis, the hostler?

A. Yes, sir."

This is all. On this testimony the Court below instructed the jury that there was evidence for the plaintiff of a "specific arrangement," "to establish his version of the contract," and "to show what took place and whether that was the contract of the hiring or employment or not." (Page 128).

It is submitted that there was no evidence from which the jury could find any "specific arrangement" or contract of hiring, that would in any way extend the responsibility of the Company. The idea of such a contract runs through the whole charge, and makes it misleading throughout.

Taking the charge as a whole, it instructs the jury to find the relation of superior and subordinate, either from a specific contract or from the nature of the employment. We contend that from the evidence the jury could find no such relation between Lewis and Sutherland, either by contract or by reason of their respective duties.

We have already stated the bit of testimony on which the whole theory of contract rests. As to the nature of the employment, there is no proof of any rule or order of the Company subordinating the "tenders" to the "hostler." On the contrary, the master mechanic and foreman both testify that the "tenders" were directly subordinate to them, and to no one else. There is really no conflict of testimony.

While Sutherland, Brewbaker and Moore each testify on examination in chief, that as a general proposition the "tenders" must obey the "hostler," each of them on cross-examination as to the practical conduct of the work, ciphers down the authority of "hostler" to the decision of the order in which the supplies of water, coal and sand shall be furnished respectively. The testimony of each, taken as a whole, conflicts in no respect with that of the witnesses for the Company. Sutherland himself admits on cross-examination (pages 35 bottom, and 36 top), that in the actual loading of the coal, the "hostler" had no supervision over him, but that the "hostler's" business was to attend to the engine while Sutherland loaded the coal, and to wait for Sutherland's signal to start. "Q. As I was saying, it was the hostler's business to attend to his engine; he was not expected to watch you? A. No, sir; I had to do my work and he— Q. And he had to do his? A. Yes."

By refusing the last instruction asked by the defendant (page 124), and by the language of the charge (page 127), the Court below misled the jury into the belief that the mere fact, that the hostler might determine the order in which the supplies should be taken, would make him the superior of the tenders, and render the Company liable to them for his negligence.

The Court erred in laying down the law of master and servant applicable to the case.

The Court laid down the rule that any right in Lewis to direct Sutherland would render the Railroad Company liable to the latter for the negligence of the former (page 127). "A fellow servant or a co laborer is one engaged in the same business and *with the same duties and to be performed together without any control of the one over the other and each acting independently of the other*," &c., &c. "Now, in this case, if the hostler, Lewis, was the superior of the plaintiff at the time of the injury, having the control and direction of his actions, and was guilty of the negligence that caused the injury, then the defendant corporation behind him is liable for such negligence, and that too, even though what the plaintiff was doing he had not been directly ordered by the hostler to do." "Now, to determine the relation of the plaintiff and Lewis, you will examine carefully the evidence, and if you find from it that at the time the plaintiff was employed as a helper to the hostler, he was to obey the directions and be under the orders of Lewis, the hostler, then Lewis would be the superior," &c., &c.

This is a very different rule from that laid down by this Court in Chicago & Milwaukee Railroad v. Ross, 112 U. S., 377. There the question was whether a conductor and engineer were fellow servants within the meaning of the rule exempting the employer. This Court held that the Railroad Company was liable to the engineer for the negligence of the conductor. In doing so, it drew the distinction between employees who can be regarded as vice-principals clothed with the powers of the employer and acting as his representatives and other employees who discharge their duties under the supervision of such vice-principals.

"There is, in our judgment, a clear distinction to be made in their relation to the common principal between servants of the corporation exercising no supervision over others engaged with them in the same employment, and agents of the corporation clothed with the control and management of a distinct department in which their duty is entirely that of direction and superintendence." . 112 U. S., 390.

The language of Judge McCrary in charging the jury in that case in the Circuit Court had laid down a much broader rule. 8 Fed. Rep., 544. He adopted the rule that the mere matter of subordination determines the liability of the employer; that wherever one person stands subject to the orders of another person whom the Company employs, the negligence of the latter is the negligence of the Company. This Court refused to adopt that broad rule.

Under the rule laid down by this Court in 112 U. S., "It is necessary, not merely that there should be subordination, but that the person in control should have such a departmental control—such an extended authority—that the Court may justly say that he represents the principal."

Mealman v. Union Pac. Ry. Co., 37 Fed. Rep. 189.

The Circuit Judge in the present case went even further than did the lower Court in Railroad Co. v. Ross. He defines fellow servants to be those "engaged in the same business and with the same duties, and to be performed together without any control of the one over the other, and each acting independently of the other." Even the doctrine that subordination determines liability requires that the subordination should be general, that the superior servant should represent the employer so far as the subordinate is concerned—such a relation, for instance, as existed between Sutherland and the master mechanic Gunther, or possibly the night foreman Bramley.

This, as we understand the decisions, is the rule adopted by the Supreme Court of Ohio. That Court has gone further than any other in extending the doctrine that subordination merely will determine the liability of the employer. In a long series of cases it has applied the doctrine to a variety of circumstances; but in each case it will be found on examination, that the person for whose negligence the employer is held responsible is one having general charge of the injured servant, and one to whom the injured servant must look, and to whom he is generally subordinate.

The case of Railway Co. v. Lewis, 33 Ohio State, 196, and Railway Co. v. Ranney, 37 Ohio State, 665, draw the line of distinction. In those cases brakemen were injured through the negligence of engineers. It was proved in each case that by rule of the Company the brakemen were obliged to obey the signals of the engineer; and in the latter case there was evidence of employees that brakemen were subordinate to engineers; but the Court held in each case that this evidence did not constitute proof of such a relation of superior and subordinate as would render the Company liable to the brakeman for the negligence of the engineer; that both were subordinate to the conductor, and that while the brakeman might, in the discharge of his duty, be subject to the direction and control of the engineer, they were still fellow servants who must be held each to have assumed the risk of the other's negligence.

These cases are closely analogous to the present case, and show that even under the rule adopted by the Supreme Court of Ohio, there was error in the rulings of the lower Court.

The rule adopted by the Circuit Judge in this case, is that contended for by the dissenting judges in Railway Company vs. Ranney, *supra*.

So far, we believe, no Court of last resort has adopted that rule. This Court has certainly refused to do so; and we confidently submit that the Circuit Court erred in adopting it.

JOHN K. COWEN,

HUGH L. BOND, JR.,

Attorneys for Plaintiff in Error.

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IN THE SUPREME COURT OF THE UNITED STATES,

October Term, 1889—No. 38.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
PLAINTIFF IN ERROR,
vs.
WILLIAM SUTHERLAND, DEFENDANT IN ERROR.

Argument for Plaintiff in Error.

JOHN K. COWEN,
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"It is laid down by Blackstone," said Chief Justice Shaw in Farwell v. Boston and Worcester Railroad Corporation (4 Metcalf, 49), "that if a servant, by his negligence, does any damage to a stranger, the master shall be answerable for his neglect. But the damage must be done while he is actually employed in the master's service; otherwise, the servant shall answer for his own misbehavior. (1 Bl. Com. 431; McManus v. Crickett, 1 East, 106.) This rule is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master, that the latter shall be answerable *civiliter*. But this presupposes that the parties stand to each other in the relation of strangers, between whom there is no privity; and the action, in such case, is an action sounding in tort. The form is trespass on the case, for the consequential damage. The maxim *respondeat superior* is

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"But this does not apply to the case of a servant bringing his action against his own employer to recover damages for an injury arising in the course of that employment, where all such risks and perils as the employer and the servant respectively intend to assume and bear may be regulated by the express or implied contract between them, and which, in the contemplation of law, must be presumed to be thus regulated.

"The same view seems to have been taken by the learned counsel for the plaintiff in the argument; and, it was conceded, that the claim could not be placed on the principle indicated by the maxim *respondeat superior*, which binds the master to indemnify a stranger for the damage caused by the careless, negligent or unskilful act of his servant in the conduct of his affairs. The claim, therefore, is placed, and must be maintained, if maintained at all, on the ground of contract. As there is no express contract between the parties applicable to this point, it is placed on the footing of an implied contract of indemnity, arising out of the relation of master and servant. * * *

"The general rule resulting from considerations, as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal contemplation the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any other."

"As to the general rule," said this court in Hough v. Railway Company, "very little conflict of opinion is to be found in the adjudged cases, where the court has been at liberty to consider it upon principle, uncontrolled by statutory regulations. The difficulty has been, in its practical application, to the special circumstances of particular cases. What are the natural and ordinary risks incident to the work in which the servant engages; what are the perils which, in legal contemplation, are presumed to be adjusted in the stipulated compensation; who, within the true sense of the rule or upon grounds of public policy, are to be deemed fellow-servants in the same common adventure or undertaking—are questions in reference to which much contrariety of opinion exists in the courts of the several States. Many of the cases are very wide apart in the solution of those questions." (Hough v. Railway Co. 100 U. S. 215 & 216.)

The decision of the three cases now before this court may involve the definition of general rules on this subject of master and servant. We, therefore, ask the court to trace, so far as may be, the history of those general rules, and thereby gain a clearer conception of their nature and proper scope than can be gained by reference to the conflicting decisions of our State courts. We have chosen as our text the language of Chief Justice Shaw, because we would have this court approach the subject as he did, free from the obscurity that later decisions have cast about the subject.

The subject divides itself naturally, as he divided it, into two heads, viz:

1. The application of the principle expressed in the maxim *respondeat superior*.

2. The duties toward the servant imposed by law upon the master.

I. The English Parliament, in the session of 1875-6, appointed a select committee of fifteen members to examine into the subject of the relations of master and servant under the law. This committee continued the examination through two sessions of Parliament, took the testimony of the men best informed upon the subject in the kingdom—barristers, judges and others—and took every means to get all the knowledge that could be got, as well of the law of master and servant and its history as of its practical workings. We quote from the report of the majority of the committee, whose recommendations resulted in the Employers' Liability Act (43 & 44 Vict. ch. 42):

"At present a master is not liable for any injury which arises from the act or default of any fellow-servant, whether that fellow-servant be in a position of authority or not; and in ascertaining whether the person to whose act or default the injury is due is a fellow-servant, the widest possible construction is given to the term, 'Common Employment.'

"That a man should be liable for injury occasioned by his own act, neglect or permission, is obviously just. That a man should be liable for injury occasioned by acts which he has neither done nor permitted, which have resulted from no neglect of his, or in disobedience to his order, or which he may have forbidden, is a result the justice of which it is not easy at once to recognize, and one which some eminent lawyers do not hesitate to describe as 'essentially unjust.' Such, however, is, and since the reign of Charles the Second appears to have been, the law of this country as to injuries occasioned by servants in the course of their employment to persons not in the same employment. For such injuries the master employing the servant is liable, notwithstanding that the acts which occasioned them may not have been ordered or authorized, or may even have been forbidden.

"There is a strong concurrence of authority against the justice of this law, though there seems to be some difference of opinion as to its origin and historical development. Some regard it as having been established on considerations of policy, as distinguished from justice; others as a mistaken application of the maxim, *Qui facit per alium facit per se.* A very slight examination of the principle involved in this maxim, which obviously relates to agency, will show that it is inapplicable to cases where the act causing the injury is done either without authority or in defiance of it. The probability is that the rule was an application of the maxim *respondeat superior*; and this probability is increased by the consideration that none of the decisions which have explained and determined the law have ever extended it beyond the limits to which that maxim would properly apply. The state of society in which the maxim *respondeat superior* obtained had passed away long before the English law was established; but there is a certain analogy, so far as affects third parties, between the position of a master hiring servants and a master or *paterfamilias* employing his slaves or children. In each case there is a single task or enterprise carried on by several persons, and it is not difficult to see how the master, the *superior*, he who puts the enterprise in motion, was held responsible to persons outside for any injury resulting from the enterprise by whomsoever occasioned; an analogy which may explain, if it does not justify, the law.

"But there is no record that the master or *superior* was liable for injury occasioned to any person engaged in the enterprise. The slave or child under the Roman law had no choice and no rights, and the English courts have always considered that a servant, who is free to choose whether he will or will not take part in the enterprise or task, by the contract of service itself undertakes to run all risks necessarily incident to the employment, the principal and most obvious of which is the injury which the negligence of others engaged in the same employment may occasion.

"For upwards of one hundred and fifty years after a master was held liable for injuries occasioned to strangers, no attempt to extend the liability to cases of injury occasioned by fellow-workmen is recorded; and when at last such an attempt was made in the well-known case of Priestly v. Fowler, which was decided in 1837, the court at once refused to extend the principle to cases to which it was not applicable, and that on the broad ground that a man is free to take the employment or not, but that if he chooses to do so he takes it with all attendant risks. The decision in the case of Priestly v. Fowler, if not the whole of the reasoning on which it is based, has been generally approved and followed by the courts in this country and in the United States.

"This judgment has, however, been the subject of much adverse criticism. It is contended that, whether the law throwing on the master the responsibility for injuries occasioned to strangers be just or unjust, the exception in regard to injuries occasioned by fellow-workmen is simply an exception to an established rule; and it is regarded as an exception specially directed against and injurious to those who from their position are most in want of the protection of the rule. But your committee consider that this view is not well founded; and they have the high authority of the late Lord Chief Baron Pollock for saying that the court, in Priestly v. Fowler, laid down no new law. He says: 'I believe it was the law; I thoroughly understood it to be so before attention was called to it.' The true principle of the law is, that no man is responsible except for his own acts and defaults; and the rule relied upon is itself not a rule, but an exception, which the courts have explained and confined within proper limits."

As stating the opposing view of this branch of the law and its history, we quote the report of the minority of the same committee. The minority report explains the liability of the master to third persons as an application of the principle expressed by the maxim, *Qui facit per alium facit per se*, contends that the principle applied originally in favor as well of fellow-servants as of strangers, and accuses the courts of having entirely altered, by judicial decision, the "common law, as it was believed to be up to 1837":

"This has been effected by means which appear to the committee to be of the most questionable nature—the inventing and enforcing a contract which never really existed. Where, beside what is expressed in a contract, there is something else in the contemplation of both parties which they would have expressed had either party required it, the committee can understand that the courts of law may be perfectly justified in saying that such a contract must be taken to have been entered into. But, so far from this being the case, the contract which the judges have assumed to be entered into by every operative, involving as it does the cession of most important rights without any consideration, is utterly unknown to the person to be bound by it, and was in its full extent, as will presently appear, unknown to the judges themselves.

"Lord Justice Bramwell remarks that the expression which has been used, that a servant contracts that he will make no claim against the master for injury done by the negligence of a fellow-servant, is an unfortunate one. The obvious difficulty in that mode of expressing it is, that neither master nor servant ever think of such a matter when they enter into the relation of master and servant.

"Justice Brett says (Question 1919): 'I say now that the law is that you cannot properly import any condition or stipulation into a contract, except one which in the minds of all reasonable men must have been in the contemplation and intention of both parties to the contract at the time it was made.'

"Another hardship connected with the proceedings of the judges is the gradual expansion of the contract which they created. They held that a fellow-servant could not by his carelessness impose any liability on his master, and then the question became all important, who was a fellow-servant? By degrees it has been held that everyone, except the master, in an industrial undertaking, is a fellow-servant with every other person employed in any capacity; thus the implied contract has swelled gradually, till the term fellow-servant is no longer required, and the rule may be stated thus: The master is liable for his own personal negligence, and for no other. Had the court' foreseen this result, all discussions as to what constitutes a common employment would have been unnecessary."

In the present discussion the importance of the issue joined between the majority and minority of the committee in their respective reports cannot be exaggerated. We are seeking to ascertain the origin and nature of the general rule of law that leaves the master free from liability to one of his servants for the negligence of another, so that we may apply the rule to particular cases. Clearly, if the master's freedom from liability is by virtue of a condition implied by law in the contract of employment, as the minority report contends—an exception created by judicial legislation to an otherwise universal principle of law—we must determine the scope of the exemption by very different criteria than if, as the majority report finds, the exemption exists, because no principle of the common law extended the master's responsibility for his servant's negligence beyond liability to persons not engaged in the enterprise.

The views expressed by the minority report need no refutation beyond the clear statement there given them. That the courts of England and of this country have gradually expanded a contract invented by the judges, and thus created an exemption for the master unknown to the common law, is an assumption too absurd to require disproof. An examination of the earliest decisions will show that they rest primarily on the ground that the rule of *respondeat superior* does not apply in favor of one connected with the enterprise, and secondarily on the ground that the master does not warrant the safety of his servant.

Priestley v. Fowler, 3 M. & W. 1.
Murray v. South Carolina R. R. Co. 1. McMullan, 385.
Farwell v. R. R. Corp., *supra.*

The argument in support of the first ground was that while the doctrine of *respondeat superior* had long been recognized, yet never had a servant sustained an action against his master for an injury received from a fellow-servant in the master's service.

On the second ground the argument is no where better stated than in the second passage above quoted from the opinion of Chief Justice Shaw in Farwell v. Boston and Worcester Rwy. Corp. 4 Metc. 49.

But it is important to note that in this passage Chief Justice Shaw is answering the argument of the plaintiff's counsel on the second ground we have stated. In the argument of the case, counsel abandoned the contention that the defendant was responsible under the rule of *respondeat superior*. He sought to avoid the decision in Priestley v. Fowler by arguing that under the contract of employment the defendant must protect the plaintiff.

The passage is often quoted in later decisions, as if it stated the reasons why the rule of *respondeat superior* did not apply in favor of the servant, and is misinterpreted as basing the whole doctrine of the master's exemption on an implied contract or condition of employment.

In fact, the decision was in favor of the master in each of the three cases we have cited: (1) because the rule of *respondeat superior* did not apply, and (2) because the mere relation of master and servant did not imply an obligation on the master's part to compensate the servant for injury received in the service.

These two reasons are negative in their character. They do not state an exemption properly so-called, but rather an absence of liability, existing not by reason of any exempting contract or condition, but because no legal wrong is shown to charge the master. The master must be responsible, if at all, either by virtue of the rule *respondeat superior* or by virtue of the relation of master and servant existing between him and the injured servant. To vary the statement, the master must be liable, if at all, either by virtue of his relations to the servant causing the injury or by virtue of his relations to the servant injured.

Under the rule of *respondeat superior*, the master is responsible for injuries caused by his servant to third persons, strangers to the master's service. Why? For reasons found in the history of our law. The master is not responsible for injuries caused by his servant to another in his service. Why? For like reasons connected with the history of our law. But the distinction is made by reason of the relations in each case between the injured one and the master, not by reason of any relations between the servant causing the injury and the injured person. The effort to define the non-responsibility of the master in the second case, in terms of the relations between the injuring and the injured, has led to much of the confusion that beclouds this subject. The terms "fellow-servant" and "common employment" have been so warped and twisted as to be useless for purposes of definition. The term "fellow-servant" is misleading in that, while it is used to define the relations to a common master, it seems to lay stress on the relations between the servants.

If we try to define the scope of the rule of *respondeat superior* in terms of the relation of the injured person to the master, it is at once apparent that there can be no distinction drawn between a servant of high degree in the service and one of low degree. Neither is a stranger to the master in the matter. So far as the rule of *respondeat superior* is concerned, the rank of employment of the servant causing the injury is of no consequence. To the stranger the master is liable for all injuries done by his servant, whether of high or low rank in the service. To one not a stranger, the master is not liable by virtue of the maxim, *respondeat superior*.

The same person or corporation may be the master of several enterprises at once. In many cases the enterprises are more or less closely related one to the other, so that there is room for difference of opinion as to whether they are distinct or separate enterprises, or are merely branches of one great enterprise that includes them all within its scope. It is not necessary here—if, indeed, it be possible—to lay down any general rule by which this distinction can be drawn. In applying the rule of *respondeat superior*, the courts have held that the servant employed in one enterprise is a stranger within the rule to another distinct enterprise conducted by the same person as master.

It is only as negativing the existence of such a relation to the master that the terms "*fellow*-servant" and "*common* employment" have any proper meaning in defining the law of this subject. The looseness with which these terms have been used in the decisions leaves them without definite meaning to-day.

The right of a servant to recover, by virtue of the rule *respondeat superior*, is confined to the exceptional case where he is injured in the conduct of an enterprise distinct from that in which he is employed.

So much then for the liability of the master, by virtue of the principle expressed in the maxim, *respondeat superior*, i. e., by virtue only of his relation to the person causing the injury.

II. Next, let us consider briefly the second ground on which the master may be held liable. This we have called his liability by virtue of his relation to the person injured.

In Priestley v. Fowler, Lord Abinger, C. B., said:

> "But in truth the mere relation of the master and servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of his servant, in the course of his employment, to the best of his judgment, information and belief."

In Farwell vs, Railroad Corporation, Shaw, C. J., said:

> "We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant, whether, for instance, the employer would be responsible to an engineer for a loss arising from a defective or ill-constructed steam engine; whether this would depend upon an implied warranty of its goodness and sufficiency or upon the fact of wilful misconduct or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing agent, in case of an incorporated company—are questions on which we give no opinion."

It is now well settled that the master's liability to his servant, by virtue only of the relation of master and servant, is a liability in tort for negligence.

> "When a master employs a servant in a work of a dangerous character, he is bound to take all reasonable precautions for the safety of that workman. This is the law of England, no less than the law of Scotland. It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure, when in fact the master knows, or ought to know, that it is not so. And if from any negligence in this respect damage arise, the master is responsible." (Patterson v. Wallace, 1 Macqueen. 748,751.)
>
> "It is equally well settled, however, that it is the duty of the employer to select and retain servants who are fitted and competent for the service, and to furnish sufficient and safe materials, machinery or other means by which it is to be performed, and to keep them in repair and order. This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed no duty required of him for the safety and protection of his servants can be transferred so as to exonerate him from such liability." (Northern Pacific R. R. Co. v. Herbert, 116 U. S. 642,647.)

Negligence is, of course, a relative term. What constitutes negligence on the master's part depends entirely on what duties the law imposes upon him as master. It is not necessary here to try to specify all the duties which the law so imposes. We wish only to call attention to the character of the master's liability. It is a liability for negligence, that is, a liability for failure to discharge a legal duty imposed by reason of his relation as master to the injured person.

Now, if the master entrust to an agent or servant the performance of his (the master's) duties to his other servants, and one of the latter be injured because the agent or servant to whom the performance of the duty was entrusted has failed to perform it, in such case the master is liable.

He is liable not because the servant to whom was entrusted the performance of the duty was not a *fellow-servant* of the injured, or was not in the *common* employment with the injured one. The master is liable not because the rule of *respondeat superior* applies to make him liable for injury caused by the neglect of his servant.

The master is liable because *he* has failed to perform a duty imposed by law. It is his own negligence, not that of his servant, that makes him liable. Indeed the servant may have been guilty of no negligence in law, because the duty rested not on him, but on his master.

It is a remarkable fact that the English courts failed to make this distinction between the master's liability for his servant's act and his liability for failure to perform a duty imposed on him as master. The result may fairly be said to have been a change of the non-liability of the master in the absence of his own negligence into a positive exemption from liability, provided the act or omission of a servant intervened to cause the injury.

The courts of this country, however, have generally made the distinction noted above, and have been logically consistent in holding the master liable for failure to perform the duties imposed upon him by law. However, in cases where the performance of those duties had been entrusted to agents or servants, our courts have confused the principle that such delegation or transfer cannot exempt the master, with the principle expressed by the maxim *respondeat superior*. They have thereupon sought to define anew the terms "fellow-servant" and "common employment" to meet the case, as if the master's liability arose by reason of his servant's negligence and not from his own. The conflict of decisions in our State courts is due in great part to the failure of some of them to distinguish the master's liability for his negligence, a liability by virtue of his relation to the injured person, from the master's liability under the rule of *respondeat superior*, a liability by virtue of his relation to the person causing the injury. This distinction is of the utmost importance from the fact that often the same man discharges many different duties in the service of his employer. For instance, in the service of many railroad companies a servant called "yard-master," in charge of a freight yard, has the duty of employing and discharging the hands that work in the yard ; he also takes frequently an active part in shifting the cars, &c., doing the same work performed by the hands. If he negligently employs incompetent hands, and by reason of their incompetence another servant be injured, then the railroad company is liable to the injured one. If this liability be by virtue of the principle of *respondeat superior*, then it must be because the yard-master is not a fellow-servant in a common employment with the yard-hand. Therefore, if a yard-hand be injured because the yard-master has turned a switch at the wrong time, the company is liable for the injury, since the yard-master is not a fellow-servant in a common employment with the injured servant. It is such reasoning as the above that has led many courts into absurdities, and that has brought to this court at least two of the cases at bar.

Now, if it be pointed out that the company's liability for the employment of incompetent hands, in the case supposed, has nothing whatever to do with the principle of *respondeat superior*, and is not by virtue of the company's relation to the yard-master ; but on the other hand that it is by virtue of the company's relation to the injured servant, for violating a duty toward him from which the company could not relieve itself by employing the yard-master to perform it, then the whole course of reasoning above outlined fails, and it becomes at once apparent that such liability gives no ground for tinkering the terms "fellow-servant" and "common employment." Those terms have no application whatever in defining the liability of the master for negligence in not performing the duties imposed by law upon him as master.

III. We cannot better illustrate the importance of the distinctions which we have sought to make clear in the foregoing discussion than by examining with some particularity the two leading decisions in Ohio in actions for damages by injured employes against railroad companies. The decisions of the courts of last resort of other states (except Wisconsin and Kentucky), are as a whole in accord with the cases that we have already cited. They do not, perhaps, draw our distinctions; they use different terms in definition, but they lay down the same general principles that we have stated, though many arrive at their conclusions by different reasoning. On the other hand, the Ohio decisions have ingrafted on the law in that state a doctrine that in Pgh. Ft. W. & C. Rwy. Co. v. Devinney, 17 Ohio St., 198, 211, is stated thus:

> "That exception is this, that where one servant is placed in a position of subordination to and subject to the orders and control of another servant of a common master, and the subordinate servant, without fault of his own, and while in the performance of his duty, is injured through the negligence of the superior servant while acting in the common service, an action lies in favor of the inferior servant so injured against the master."

The first case was that of Little Miami R. R. Co. v. Stevens, 20 Ohio, 415. The declaration alleged that the defendant railroad company possessed a railroad running from Cincinnati to Springfield, and two certain locomotives with railway cars attached to each, the one thereof running from C. to S. and back again the ensuing day, the other running from S. to C. and back the ensuing day, which locomotives, with their respective trains, were accustomed to meet and safely pass each other at Plainville, by express direction and arrangement of the defendant; and, whereas, the plaintiff, at the time, &c., was employed by the defendant as engineer upon one of said locomotives, and was accustomed to stop at Plainville and there to safely pass the other locomotive; and whereas, by reason of the premises, it became the duty of the defendant, by its agents and servants, to give the plaintiff due and timely notice of any change in the place of meeting and passage of the said locomotives and trains; yet the defendant, by its agents and servants, not regarding its duty as aforesaid, did change such place of meeting and passage from Plainville to Columbia, without giving the plaintiff due and timely notice thereof, whereby, on the very day the change went into effect, whilst the plaintiff was proceeding, in the capacity of such engineer on one of the locomotives with a train, from C. to S., according to the previous express direction and arrangement of the defendant in that behalf, between Columbia and Plainville, the other locomotive unavoidably ran against and came into collision with that on which plaintiff was, and crushed the same, whereby plaintiff was wounded, &c., &c.

From the bill of exceptions, it appears that time-cards had been issued by the superintendent and delivered to all the engineers and conductors except Stevens, giving notice of the change in the time and place of passing. The times and places of passing had been previously governed by similar cards, also furnished the engineers and conductors by the company, in accordance with the custom of the company, by which the engineers and conductors were notified of all changes in the times and places of passing. Stevens stopped at the new passing point, but the conductor told him the change did not take effect until a subsequent day, and told him to go on.

The case was argued in the Supreme Court of Ohio before Hitchcock, C. J., and Caldwell, Ranney and Spalding, JJ. Caldwell, J., delivered the opinion of the court; Hitchcock, C. J., delivered a separate opinion; Spalding, J., dissented. Caldwell, J., after stating the facts, and that the main question is the liability of the company to Stevens for the negligence of the conductor, says:

> "It is a general rule that a person in the management of his business, whether he does it himself or acts through agents, must so conduct that business as not to interfere with the rights of or produce injury to others. This devolves on the party care and prudence in the management of his business, and renders him civilly responsible for any injury that may result to others from the want of such care and prudence, whether the injury may be done under his own immediate supervision or under the control of agents. This docrine is founded on reason. * * * * * *
>
> "Indeed, the rule is not only a reasonable one, that the employer should make good the injuries thus done by the carelessness of his agents, but it is necessary as a preventive of mischief and a protection to the community that it should be strictly adhered to. The rule is founded on the principle of justice between man and man, and, abstractly considered, is of universal application. There must be some good reason for taking any case without its application."

To the principle *respondeat superior*, as here defined, there is no limitation. Under this, the employer insures the employed against injury in the service.

The learned Judge proceeds:

> "It is said, however, that when a party contracts to perform services, he takes into account the dangers and perils incident to the employment and receives wages accordingly. Take this for granted, and we think it falls far short of sustaining the main proposition. If the party does contract in reference to the perils incident to the business, he will only be presumed to contract in reference to such as necessarily attend it when conducted with ordinary care and prudence. So far as an implied contract in reference to the business will be presumed, it will be on the hypothesis that the business is to be properly managed. He cannot be presumed to have contracted in reference to injuries inflicted on him by negligence—by wrongful acts. An express stipulation would at least be necessary to make it a part of the contract. The employer has paid him no money for the right to break his legs, or, as in this case, to empty on him the contents of a boiler of scalding water. It was not the expectation when the company hired Stevens that the two trains should be run by different cards, and thus come in collision.
>
> "When a man employs another to do work for him, each incurs their obligations. The person hired is bound to perform the labor according to the agreement, and the employer is bound to pay; besides that, neither party has parted with any of his rights. The employer has no more control over the person he has employed, outside of the service to be rendered, than he has over the person of any other individual, *and is equally accountable for an injury to it.*"

It will be noted that Judge Caldwell adopts the "contract theory," the theory stated in the report of the minority of the committee of Parliament. His conclusion leaves the employer liable equally to employes and to strangers. This conclusion certainly disposes of the case. But there seems to have been a glimmering in the judge's mind of the idea that the negligence in the case was that of the company itself and not merely the negligence of the conductor, for which the company was answerable by virtue of the maxim *respondeat superior*. This idea can be gathered only from disconnected statements.

"In this case the evidence leads the mind irresistibly to the conclusion that Stevens had not received a card or any certain information that the change was to take place on the day of the collision. The effects of a collision are so dangerous that it was certainly the duty of the company to furnish him with that information.

The opinion then takes up the question of contributory negligence and disposes of it thus:

"When we take into account the fact that Stevens had not received the ordinary notice of the change, and the fact that he was told that the change did not take place until a subsequent day by the person who had the control of the cars and the right to give him his orders as to running and stopping, we do not think that there was evidence showing negligence on his part.

"Stevens had engaged to labor for the company in a subordinate capacity. He has received the injury from the negligence of those placed over him by the company, as the jury has found, and we do not see why the company are not liable to him for the amount of the damage he has sustained."

After treating the question of public policy, he continues:

"We could easily suppose a case where two persons employed by the same individual and standing on a perfect equality—where the business was managed as much by one as the other—where they would stand on the same footing as men in the community generally do, in which the employer would not be liable for an injury done to one by the negligence of the other. But we regard this case as standing on entirely a different footing."

As the learned judge had already laid down the rule that the employer would be liable to his employe by virtue of the principle *respondeat superior* equally and by the same principle as he would be liable to a person not his employe, the supposible case must be one in which the employer would not be liable to a stranger. But really it is impossible to trace any definite course of reasoning in the last extracts. They are simply disconnected expressions of a confused mind.

The next paragraph, which we need not quote, shows that the learned judge misunderstood the reasoning in

Farwell v. Railroad Corporation, 4 Metc. 49, although he recognized that his reasoning was in conflict with C. J. Shaw's.

The syllabus of the Stevens case states the points decided thus:

> 1. "Where an employer placed one person in his employ under the direction of another, also in his employ, such employer is liable for injury to the person of him placed in the subordinate situation by the negligence of his superior.
>
> 2. "When a railroad company places the engineer under their employ under the control of the conductor, who directs when the cars are to start, stop, &c., the company are liable to the engineer for an injury received, occasioned by the negligence of the conductor, whilst they are both engaged in their respective employments."

It is this syllabus that has fixed upon the law of Ohio "the rule of superior and subordinate." The reasoning of Judge Caldwell's opinion has long since been discredited by the Ohio court. His views on the scope of the principle *respondeat superior* have been discarded and are expressly overruled in Pgh., Ft. W. & C. R. R. v. Devinney, 17 Ohio St., 198.

No ground for the distinction made by that rule can be found even in the reasoning of Judge Caldwell.

Hitchcock, C. J., in his opinion places the decision in favor of Stevens on very different ground. He says (20 Ohio, p. 436 et seq.):

> "I concur in the opinion of the court affirming the judgment of the Court of Common Pleas; and it seems to me that this may be done without conflicting at all with the authorities which have been cited by the plaintiffs in error. If this case were, in its principal features, like any one of those reported and referred to, I should hesitate long before I would consent to disregard those decisions. They were decisions made by highly respectable tribunals, and by men whose opinions are entitled to the highest consideration. But in each case referred to as being decided in the United States, the action was commenced for an injury received by one employe or servant of the company, in consequence of the neglect or default of another employe or servant of the same company, both at the time being engaged in the running of the cars.

"This case, as it appears from the bill of exceptions, is entirely different. The neglect complained of is not the neglect of an employe or servant of the company upon the road, but the neglect of the company itself, so far as an incorporated company can be chargeable with neglect.

"It appears that the company determine upon the places where the trains shall pass each other, when running the same way or different ways. Through their superintendent they furnish their engineers and conductors with cards, stating the several places where the trains are to pass, with other instructions, by which the engineers and conductors are to be regulated in running. * * *

"Here was negligence, in consequence of which, an injury resulted to the defendant in error. It was not the negligence of any employe of the company assisting in running the cars; unless, by possibility, the conductor of the train had been notified of the change, of which there is no satisfactory proof. But it was the negligence of the company itself, or of its immediate agent, the superintendent of the road. * * *

"The superintendent is a proper representative of the company, and, perhaps, to a certain extent, the conductor of a train may be. But the employes or servants of the company, engaged in making or repairing their road, or in running their cars, cannot be held to be their agents.

"It is because this injury resulted from the negligence of the company itself, or of an agent whose duty it was to give the notice before referred to, that I hold the judgment should be affirmed; and it seems to me the case is entirely different from those referred to in the books."

The next case was that of C. C. &. C. R. R. Co. v. Keary, 3 Ohio St., 201, also a collision case. The syllabus of the decision states the following points:

1. "It is a settled maxim of the common law, founded upon the highest obligations of social duty, that everyone shall use his own and so prosecute his lawful business, as not by his negligence or want of care to injure others. Hence the law exacts of him who puts a dangerous force in motion that he shall control it with reasonable care and skill.

2. "He cannot divest himself of this obligation by committing its control to another, but he still remains liable upon the maxim, *respondeat superior*, for such injuries as arise from the negligence or carelessness of his agent while engaged in the prosecution of a business.

3. "These principles apply where a railroad company place a brakemen in their employ under the control of the conductor, the latter having the exclusive command of the train, and the brakeman, without fault on his part, is injured by the carelessness of the conductor. In such case the brakeman is entitled to recover of the company for the injury; the conductor being the sole and immediate representative of the company upon which rested the obligation to manage the train with skill and care.

4 "But a principal is not liable to one servant in his employ for injuries resulting from the carelessness of another servant, when both are engaged in a common service, and no power or control is given to the one over the other. They stand as equals to each other, and are alone liable for the injuries they may occasion.

5. "This distinction arises from the nature of the relation of master and servant, and from the express and implied obligations incident to the contract of service. As between *them*, the company undertakes to furnish suitable machinery and apparatus, and control it with prudence and care. The servant undertakes to obey and perform as he is directed; the company, reserving to itself the power of control, as between it and the servant, assumes the obligation to do it with care and skill, and a failure to do so, whether arising from the fault of the corporation, or its representative appointed for the purpose, is a breach of this obligation.

6. "But when the failure occurs in that branch of the service committed by the principal to the subordinate servants, it is their fault, and not that of their employer, and a breach of their obligations, and not his; and where they enter the service with a knowledge that several are to be engaged, each takes upon himself the hazards of the employment, including that of negligence by fellow servants, and public policy requires that they should be interested in exercising supervision over each other.

7. "The agent or officer intrusted with power and control over the subordinates and the operations of the business, is not engaged in a common service with them, admitting of joint participation; nor is he, in any just sense, their fellow-servant; but their employments are separate and distinct, although both are necessary to a successful result in the business.

8. "The case of Stevens v. Little Miami R. R Company, 20 O. R. 415, examined and affirmed."

It will be seen that the Stevens case is affirmed substantially on the ground taken by C. J. Hitchcock in his opinion. The reasoning in the Keary case is not that of Judge Caldwell. Judge Ranney delivered the able opinion in the later case. There is no statement of facts in the report of the case. In the opinion, the facts are assumed to be substantially identical with those of the Stevens case. The plaintiff, a brakeman, was injured in a collision caused by conflicting train orders. It is left an open question whether the superintendent or the conductor was responsible for the existence of the conflicting orders.

With the conclusion that the company was liable to the brakeman so injured, we take no issue. Grant the proposition that it is the duty of the company to issue orders for the running of its trains, and the duties follow to have those orders proper ones and to have them reach the servants who are to put them into execution. The only question, then, is whether the conductor is a servant charged with the execution of those orders, or a servant charged merely with the conveyance of them. The effect of the Ohio decisions is to hold that the ~~engineer~~ conductor of the train is the servant charged with the conveyance of such orders, and that the company has not discharged its duty till the orders reach the engineer. The decisions in other states hold that the conductor is the executive servant in such a case. The difference is not one of principle.

But the question to what rule shall be ascribed the obligation of the company to issue orders, to see that they are proper ones and are properly transmitted, is a question of principle, and an important one.

Judge Ranney traces the obligation to the principle expressed by the maxim, *sic utere tuo ut alienum non laedas*, but at the same time ascribes it to the principle *respondeat superior*, as though the two principles were equally broad.

Indeed, he seems to give as wide scope to the latter principle as to the former. The former principle lies at the foundation of our law of tort, and the principle of *respondeat superior* is doubtless an application of it. The principle on which the obligation of the company toward its employes rests may also be an application of it, but that is far from proving that the principle of the obligation is the principle of *respondeat superior*.

Judge Ranney's own statement of points shows that the obligation of the company cannot be ascribed to the principle of *respondeat superior*. He says the company is liable to the brakeman for the negligence of the conductor, but that "a principal is not liable to one servant in his employ for injuries resulting from the carelessness of another servant, when both are engaged in a common service, and no power or control is given to the one over the other." "This distinction," he says, "arises from the nature of the relation of master and servant, and from the express and implied obligations incident to the contract of service As between *them*, the company undertakes to furnish suitable machinery and apparatus and control it with prudence and care." Thus the distinction is due to the character of the obligation itself, which is defined by the relation of master and servant existing between the company and the injured person. But by the judge's own definition the rule of *respondeat superior* has nothing to do with the injured person. The obligation of the principal under that rule arises solely by virtue of his relation to the person causing the injury. The judge's fifth point demonstates the error of his second point.

It was the failure to note the importance of the distinction between the liability of a principal by virtue of the maxim *respondeat superior*, and the liability of a master by virtue of his obligations to his servant growing out of the relation of master and servant *between them*, together with the necessity of giving some reason for the rule of superior and subordinate established by the Stevens case— it was these reasons that induced the propositions laid down in the seventh point.

Having in mind the common statement that the master is not liable to one servant for injury caused by the negligence of a fellow-servant in the common employment, the court felt compelled to explain its decision in the terms of that statement. The seventh point, therefore, states the following propositions:

> "The agent or officer intrusted with power and control over the subordinates, and the operations of the business, is not engaged in a common service with them, admitting of joint participation; nor is he, in any just sense, their fellow-servant, but their employments are separate and distinct; although both are necessary to a successful result in the business."

We have already pointed out that the terms "fellow-servant" and "common employment" have no application in defining the master's *liability* for failure to perform the obligations imposed by law upon him as master; that the only application of those terms in defining the master's *liability* is in defining and limiting his liability under the principle of *respondeat superior*. We also pointed out that the use of those terms to mark the limit of the master's liability under the principle of *respondeat superior* is apt to mislead, because what the terms are meant to express is the respective relations of the injuring and the injured each to the master of the same enterprise, and yet the terms *seem* to emphasize the direct relation between the injuring and the injured, one toward the other. The Ohio court was so misled.

The absurdities that follow the attempted application of the propositions stated in the seventh section of the syllabus are the best illustration of their fallacy. For instance, the conductor is not the fellow-servant of the brakeman in a common employment, and therefore the company is liable to the brakeman for the negligence of the conductor; but the company is not liable to the conductor for the negligence of the brakeman, because the brakeman is the fellow-servant of the conductor in a common employment. The conductor of a train is not a fellow-servant of the brakeman or the engineer on the same train, but every conductor of every other train running on the road is the fellow-servant of that brakeman and that conductor, and in a common employment with both. (Railroad Company v. Devinney, 17 Ohio St., 198.) Moreover, the employes engaged in repairing track are fellow-servants in a common employment with the train crew, conductor, engineer, brakeman and all. (Whalen v. Mad River & L.

E. R. R. Co., 8 Ohio St., 249.) In the last case the terms "fellow-servant" and "common employment" are used in their proper meaning. In the Keary case, they are used to describe the direct relations between the servants, one toward the other.

A slight examination will show that the rule of superior and subordinate rests on no sound distinction, either under the principle of *respondeat superior* or under the principle that the master is liable for failure to perform the duties toward his servants imposed by law upon him as master. We have already shown that such a distinction cannot be drawn under the principle *respondeat superior*, and that the Ohio decisions themselves have followed the proposition to its *reductio ad absurdum*.

The rule coincides with no distinction under the second principle stated. It is true that under this principle the master is not relieved from liability to his servant for failure to perform his duty by the fact that he may have entrusted the performance of the duty to another servant, although the injury may be traceable primarily to the non-performance of the servant so entrusted. (Railroad Company v. Herbert, 116 U. S., 642, 647.) But the Ohio rule of superior and subordinate goes beyond this. It seeks to draw an arbitrary line—a line that does not, in fact, exist in the organization of any business enterprise—between what it terms superior servants and what it terms subordinate servants, and then holds the master responsible to the so-called subordinates for all acts and omissions of the so-called superiors, whether those acts and omissions be in the discharge of duties imposed by law on the master, or merely in the performance of service as operatives. To illustrate, suppose a train to reach a side track must pass two switches, one of which is manned by a brakeman and the other by the conductor of the train; and suppose that in passing the switch manned by the brakeman the locomotive is derailed by the carelessness of the brakeman in turning the switch, and the engineer is injured—in that case the railroad company is not liable to the engineer. But suppose the locomotive is derailed at the second switch by the carelessness of the conductor in turning that, then under the Ohio rule the company is liable to the engineer for any injury received by him.

Our excuse for troubling the court with this long discussion is that the decision of this court in Railroad Company v. Ross has been interpreted as an adoption of the Ohio rule of superior and subordinate. Hence the cases now before the court. We think it perfectly clear from the reasoning of that decision that this court meant to go no farther than did Hitchcock, C. J., in the Stevens case. We admit that in the Ross case terms are used *arguendo*, to which a special meaning has attached in Ohio; but it was impossible in stating the views of other courts to avoid the use of their language. It does not follow that this court intended to take the absurd position on this branch of the law now occupied by the Supreme Court of Ohio alone.

We respectfully submit that unless the court goes the full length of the Ohio doctrine and beyond, the case of the Baltimore and Ohio Railroad Company v. Sutherland must be decided in favor of the plaintiff in error.

JOHN K. COWEN,
HUGH L. BOND, JR.,
Counsel for Plaintiff in Error.

Supreme Court of the United States

In Error to the Circuit Court for the Northern District of Ohio.

THE BALTIMORE AND OHIO
RAILROAD CO.,
Plaintiff in Error,

vs.

WILLIAM SUTHERLAND,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

By G. R. Walker.

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This Petition in Error is filed to set aside a judgment of the Circuit Court of the United States for the Northern District ef Ohio, rendered at its December term, 1884.

In his petition the plaintiff below alleged that he had been seriously injured while in the employ of the plaintiff in error, in the line of his duty, by reason of the negligence and carelessness of one Edward Lewis, a locomotive engineer, called a "hostler."

That defendant in error was employed as a "helper," or "tender," and, by the contract of employment, was placed by said defendant below—The Baltimore and Ohio Railroad Company—under, and was bound to obey the orders of the said engineer or hostler.

R. 22, 23, 24. See record, pages 22, 23, 24.

The defendant below answered, admiiting the alleged injuries, and that the plaintiff below was employed by contract to serve under the orders and immediate direction of the said Edward Lewis, as such alleged engineer or hostler.

The language of the answer

"That it is not true that the said Edward Lewis was a "superior servant of this defendant to the said plaintiff, but, "on the contrary, was a fellow servant with him, engaged in a "common service with him at the time of his injury,"

Is nothing more than an allegation of the legal relation claimed to follow from the alleged "common service," and in no sense denies the alleged fact of the employment being to serve under, and to obey the orders of the said Edward Lewis.

The negligence of the "hostler," Edward Lewis, is directly admitted in the following language of the answer:

R. p. 13. "And that the said injury was the direct result of the carelessness and negligence of the plaintiff * * and of the "carelessness and negligence of his said fellow servant, "engaged with him in the common service of the defendant."

Record, page 13.

The answer sets forth a third defense. But as no proof was offered on that issue, it needs no further notice.

An exception was taken by the defendant below to a claimed irregularity in the impannelling of the jury, whereby one Caleb Bevier, a juror, being taken suddenly sick, the panel was dismissed after being sworn, but before the trial had further proceeded; wereupon the Court proceeded to and did impanel another jury.

It is claimed that two jurors, who had been challenged peremptorily from the first panel, were called into the second panel. Record, p. 21. R. p. 21.

It does not appear that any objection, or challenge for cause, was made by counsel, or that any complaint was made at the time of any bias on the part of jurors called, nor that any limitation of the rights of the party had occurred.

The party seems to have had a fair trial before a competent and unbiased jury, which is all it could claim.

In the case of the Northern Pacific Railway Co. vs. Herbert, 116 U. S. page 642, the Court say, 116 U. S., 642.

" A trial by an impartial jury being all that a party can " demand, the allowance of a challenge for cause, even if the " cause was insufficient, is no ground for complaint, where a " competent and unbiased jury was finally selected."

The party had a fair trial before an impartial jury, and has no right to complain.

Without occupying time or space for particular reference to the various specifications of error, I content myself with selecting the one only remaining question which appears to me decisive of the case, which is in substance as follows:

Was the Railroad Company liable to Sutherland, its employee, for the negligent acts of its "hostler," or agent, Edward Lewis, resulting in injury to him, Sutherland.

We claim such liability on the part of the Company for the reason and upon the ground, that the Company placed the employee, Sutherland, by its contract of employment, in a subordinate position to its agent Lewis, by whose sole negligence the injury was caused.

In reason it would seem that a distinction is to be made, where, *by the contract of employment*, one is bound to obey the orders of the superior servant, and, where, by reason of the mere fact of position, obedience is presumed.

In the former case, the one in authority represents, and is, as to the subordinate, the representative of the personality of the Company.

In the other, the custom of the business or employment may be said to govern the relations of the employees, and, by some Courts it is held, determines whether the one or the other is the superior, in the sense of attaching legal responsibility.

To what extent, in the latter case, they will be regarded as "fellow servants," engaged in a common service, is a question that has run through many refinements, to the end of shielding the employer from liability, and on which Courts for many years have held diversely.

We also claim that the Company is, in this case, liable upon either one of the grounds stated, namely: Whether by reason of the contract of employment being such as placed Sutherland under the orders and control of the said Lewis, or by reason of his, Lewis', being such superior employe to the servant Sutherland, as bound the latter to obey the direct orders of his immediate superior.

This is the doctrine established in Ohio, and maintained for some forty years or more, and in proof of which I cite a few leading authorities of that State on that subject.

20 Ohio, 415.

In the case of The Little Miami Railroad Co. vs. Stevens, 20 Ohio Reports, p. 415, the Court say:

" Where an employer placed one person in his employ " under the direction of another, also in his employ, such " employer is liable for injury to the person of him placed in " the subordinate situation, by the negligence of his superior."

" When a Railroad Co. places the engineer under their " employ under the conductor, who directs when the cars are "to start, stop, &c., the Company is liable to the engineer for "an injury received, occasioned by the negligence of the con- "ductor, whilst they are both engaged in their respective "employments."

This holding of the Court would render the Railroad Co. liable for the acts and negligence of the conductor toward his subordinate without reference to the conditions of the contract of hiring, and would, of course, also include the case of a contract to work under and obey the orders of a particular person.

The rule of "Respondeat Superior" is thus recognized in Ohio.

Where one holds a position of control over another,, by appointment of the master, whose orders and directions the inferior servant is bound to obey, and by whose negligence such inferior is injured while in the line of his duty to the master, such master is liable for compensation.

In Railroad Co. vs. Keary, 3d Ohio St., p. 201, (clause 9 of syllabus,) 3d O. S., 201.

"The agent or officer intrusted with power and control over "the subordinates and the operations of the business, is not "engaged in a common service with them, admitting of joint "participation, nor is he in any just sense their "fellow ser- "vant;" but their employments are separate and distinct, "although both are necessary to a successful result in the "business."

In Whaalan vs Railroad Co., 8 O. S. 249, the Court say, 8 O. S., 249. (See 1st clause of syllabus,)

"Where a servant is injured in his person through the care- "lessness of a fellow servant engaged in a common business "and employment, *and no relations of subordination or sub- "jection existed between them*, and the employer is himself "guilty of no fault, such employer is not responsible for such "injury."

In this case the ruling of the Court is based upon the qualification that no relation of subordination existed between such servants.

17 O. S., 198. The case of Railroad Co. vs. Devinney, 17 O. S., 198, rests upon the same exception. In that case the negligence was of the train men *on another train* than the one on which plaintiff was employed and injured, and, hence, that the negligence was not of one having authority or control of the injured party.

31 O. S., 287. In case of Berea Stone Co. vs. Kraft, 31 Ohio State Reports 287, the Court say,

"The master is liable for an injury to a servant resulting "from the negligence of a superior servant, while the latter "is discharging the duties of one under his control, to the "same extent as if the act causing the injury had been "committed by an inferior servant under his directions." (Syllabus.)

33d O. S., 150.
" " 468.
36 O. O., 221.
The cases of Kumler vs. Railroad Co., 33d Ohio State 150; and of Railroad Co. vs. Knittal, ib. p. 468; and of Railway Co. vs. Lavalley, 36 O. S. 221, hold the same doctrine. In the latter case the Court say,

"A foreman was put in charge of a set of hands whose business it was to repair freight cars while standing on the track "in the yard of the Company, in which trains were accustomed to be made up. It was also the duty of the foreman "to participate with the hands in doing the work. While "the foreman and a hand were engaged in repairing a car, "and the latter was at work under the car by order of the "foremon, he was injured by the striking of the car on which "he was working by another car moving on the same track. "Held, that the hand was the subordinate of the foreman in "respect to the work in which he was engaged at the time he "was injured, and * * * that the Company was liable."

I will cite in this connection but one additional case, viz: Railway Co. vs. Spangler, 44 O. S. p. 471. 44 O. S., 471.

This was a case wherein the defendant in error, a brakeman, brought suit for injuries received in the employ of the Company, by reason of the alleged negligence of the conductor of his train. The Company pleaded a release signed by the party, before entering upon the service, whereby he agreed not to hold the Company responsible for any negligence of any conductor, foreman, or otherwise, "*whether they are* " *superior to me or not.*"

The Court held that such a contract was against public policy and void, and, on page 478, say, 44 O. S., p. 478.

" The doctrine established by these cases has remained unquestioned by this Court for more than 30 years. * * *

" It is the firmly established policy of our law that such " liability should attach— * * *

" Such liability is not created for the protection of " employees simply, but has its reason and foundation in a " public necessity and policy which should not be asked to " yield to mere private interests and agreement."

In the case of Railroad Co. vs. Keary, 3d O. S. page 210, 3d O. S., 210. the Court say,

" Let the Company be liable only upon the maxim 'respon- " deat superior,' or upon the obligations arising out of the " contact of service, and, in either view their liabiltty for " injuries to their subordinates, caused by the carelessness of " the conductor they have placed over them in charge of the " train is, in our opinion, sufficiently apparent.

" This conclusion rests wholly upon the idea that the " Company, from the very nature of the contract of service, " is under obligations to them, as well as they to the Company.

" * * *

" They commission him to exercise that dominion over " the operations of the train, which essentially pertains to the

" prerogatives of the owner, and, in its exercise, he stands in " the place of the owner, and is in the discharge of a duty " which the owner as a man and a party to the contract of " service owes to those placed under him, and whose lives may " depend on his fidelity.

" His will controls everything, and it is the will of the " owner that his intelligence alone should be trusted for this " purpose.

" This service is not common to him and the hands " placed under him. They have nothing to do with it. His " duties and their duties are entirely separate and distinct. " * * It is his to command and theirs to obey and execute.

" No service is common that does not admit a common " participation, and no servants are fellow servants when one " is placed in control over the other."

As to the contract of employment, Mr. Sutherland testifies, record p. 22,

" I was employed as tender, tending engines."

After saying, in substance, that he was employed by one F. J. Gunther, master mechanic of defendant at Chicago Junction, Ohio, says, p. 23,

" He hired me as a tender, to tend to engines, and Edward " Lewis was hostler, and that I should work under him."

The testimony of Albert Burdge, is that he (Burge) occupied the same position for seven months, and that he was directed to serve under the orders of the hostler. Record, p. 64, 65. R. pp. 64; 65.

By the testimony of said F. J. Gunther, record p. 114, after stating the several duties of the hostler and his helpers, he was asked, p. 114: R. p. 114.

" When you hired Sutherland, what, if any, instructions " did you give him, as to his obeying in his work, Lewis, the " hostler ?"

"I couldn't say that I gave him any instructions. I "don't recollect that I did anything of the kind. I may "have told the man that the hostler would tell him what to "do, or something of that kind, but I couldn't say that I did "*or did not.*"

And on page 115, the same witness is asked if he used R. p. 115. the word "obey" Lewis, &c. To which he answers,

"I would be unable to say whether I did or not."

The record is probably defective in not showing the word "obey" to have been used by the witness Sutherland, this evidently being an effort to contradict Sutherland in the use, by him, of the word "obey," but the witness, Gunther, will not testify to suit them on the matter in question.

Then the substance of the testimony of the plaintiff below is that he was, by his agreement, to work under Lewis, and the man who employed him refuses to deny using the word "obey" Lewis, in hiring him.

By the testimony of Sutherland, p. 24, of F. J. Gunther, R. p. 24. p. 113, and of J. Brewbaker, p. 49, it appears that the duties R. p. 113. of the "Hostler" were in the nature of both conductor and engineer; that he had sole charge of the several engines coming in nightly, of which there were usually from eight to fifteen to be handled in like manner.

It could hardly be said that these machines were being received and thus handled without any one having charge of them. If the Hostler had full control of them, then he did in fact and in reason represent the company as fully as an agent could represent his principal.

In the case of Rail Road Co. vs. Ross, 112 U. S., p. 377, 112 U. S. 377. decided in Dec. 1884, this Court say (p. 396): " " 396.

"There are decisions in the Courts of States, more or "less in conformity with the decisions cited from Ohio and "Kentucky, rejecting or limiting to a greater or less extent

" the master's exemption from liability to a servant for the " negligent conduct of his fellows.

" We agree with them in that holding, and the present " case requires no further decision, that the conductor of a " railway train, *who commands its movements, directs when it " shall start, at what stations it shall stop*, at what speed it " shall run, *and has the general management of it and control " over the persons employed upon it*, represents the company, " and therefore, for injuries resulting from his negligent acts " the company is responsible.

" If such a conductor does not represent the company, " then the train is operated without a representative of its " owner."

In the case of this " Hostler," how much less an autocrat is he than the conductor of an ordinary train of cars, so far as his control of his helpers and the property in his charge is concerned? His word is to them final. His will as to the movements of the engine and men, is the end of the matter. If a conductor represents the employer in the one case, the " Hostler" must equally so in the other. It is the character of the service, as to having control, which settles this question.

I insist, then, that, by the pleadings, as well as by the testimony and the verdict, Sutherland was subordinate to the " Hostler," Lewis, and that, by the decisions of the Courts of Ohio, the judgment would be sustained. Why should it not be by the Federal Courts as well?

RELATION OF STATE AND FEDERAL COURTS.

The injured party is a citizen of Ohio, where the contract was made, the service rendered, the injury occurred and the suit brought, in the State Court.

The B. & O. R'd Co., although doing a large business and having a large property interest in that State, enjoying the equal protection of its laws, was chartered by another State, and, by reason of a Federal Statute, probably passed as a protection against local prejudice and unjust discrimination, is able to transfer its legal controversies from the State to the Federal Courts; so, that, while ~~every~~ others ~~one~~ of the many railroads doing business there is bound to submit to the jurisdiction of the State Courts, this company is an ~~the sole~~ exception.

Justice toward Sutherland would seem to require that his rights be adjusted by the tribunals of his own State—in other words, at home—but as that can not be enforced, then, that the same rule *as to his rights, and the liability of the company*, be applied in his case in the Federal Courts as would obtain in case his contention was with any other one of the many railroads doing business in Ohio. And a just equality among the different companies would seem to be subserved thereby. What sound reason can be given for permitting a law passed to prevent unjust discrimination *against a foreign corporation to produce that result in its own favor?* thereby giving it an unfair advantage over other similar corporations.

RESPONDEAT SUPERIOR.

The doctrine of respondeat superior, as laid down and limited in Ohio, seems founded in reason and justice, and is in principle in accord with the common law, as expounded by the highest Courts for ages before the idea of the non-liability of the employer was invented, while the whole idea of the non-liability of the employer for the negligent acts of a co-employe is founded upon an exception to this general principle, of recent invention, in an English Court, was aimed at the laboring class of that country, is without reason, and to be characterized as judicial class legislation, wholly ignoring the rights of a most meritorious class of citizens, the class most needing consideration by the government and laws.

The case of Priestly vs. Fowler, 3d Meeson & Wellsby, p. 1, claims, and is conceded to have been the first case in which the rule of non-liability of the employer, etc., was ever announced. Of that case and its doctrine, the Supreme Court of Illinois, in the case of Rail Road Company vs. Moranda, 93rd Ill., 302, say:

" The history of this doctrine of exemption of the employer, as well as the best reasoning of the cases, shows that " what we have spoken of as a rule, (exempting the master in " certain cases,) is in fact but an exception to the general rule " of the common law, respondeat superior, which, prior to " the case of Prestly vs. Fowler, was laid down by all Courts " and common law writers."

And cites this language of Comyn's Digest:

" A master is liable for every act of his servant, done by " him in the course of his employment."

Also from Viner's Abridgement:

" If my servant doeth anything prejudicial to another, " it shall bind me, being about my business;" and, besides others of equal antiquity, refers to similar language found in Paley's Work on Agency, published in 1811, pp. 294, 295. Also the following from Story on Agency, 1839:

" The master is always liable to third persons for * * * " negligencies * * of his servants in all cases within the " scope of his employment."

And adds:

" No limitation of this rule was ever anywhere suggested " until this question arose of the liability of a master to his " own servant for injury by the neglect of another."

It was said by an English Judge, in deciding the case of Vose, Adm'rx, vs. The Lancashire & York R'y, in the Court of Exchequer, 3d of Hurlstone and Normans, 728:

"The law must have been the same long before the case "of Priestly vs. Fowler. If not, such actions must have "been of frequent occurence." 3d H. & N. 728.

While nothing could be farther from the truth, as the above references to the older doctrine clearly show, being therefore an invention of the time (1837), it is said—to subserve "public policy," a phrase supposed to sound well in the public ear, but too often used to cover private ends. Its object may be inferred from the language of the Judge in the case last cited, when he says:

"In my opinion, we ought to be extremely cautious not "to relax the rule laid down in this Court, that, with respect "to servants in a common employ, the master can not be made "answerable for an injury caused to one servant by the negligence of another. * * * Few rules of law are of greater "importance. * * * We ought not to allow so important "a decision to be frittered away by minute distinctions or the "ingenuity of advocates."

Why so important? Whom does it benefit? and whom does it sacrifice? or what public policy does it subserve?

These questions answer themselves.

Anybody can see that such a ruling simply benefits the employer class, the large manufacturers, and the owners—not the operators of great railroad systems, those who count their gains by the millions, while it denies ordinary and usual protection—such as is given to the public at large, to that class—not of criminals and vagabonds, but of meritorious citizens, to whose courage, intelligence, fidelity, patience and toil are intrusted the chief interests of our country.

Commit your railroad trains to the charge of your criminal classes, such as might merit such a ruling, and they will ditch them in the first ravine and pay themselves out of the plunder.

If railroad companies can not afford to pay something toward the natural and necessary losses and injuries resulting from the conduct of the business to those who are themselves without fault, and according to the rules of right applied to other people, and without making of their employe's an exception of outlawry, then would it not be best to recast the system of charges so that the business shall bear its own burdens, justly and fairly incurred, so far as not to make an exception of those who are so important an element in the business and social interests of the country?

It is said that the employe is supposed to have taken into account these risks and dangers in fixing the price to be paid for his services. This may seem reasonable, so far as the ordinary risks of the employment are concerned, but these do not in other cases include acts of negligence. Why should it in this?

But to say that such employe does, in fact, take into account these dangers, in fixing his price, is a fiction, since, as a fact, the employe does not, while the employer does fix the rate of compensation.

It is said that the employe will be more careful, and will use his influence to induce others of his fellow servants to greater diligence to avoid accidents, &c.

Suppose this to be true to the limited extent of embracing those of his own grade of employment and personal connexion. But how shall we explain it when extended to those whom he never saw? and to those placed over him by the pleasure of the employer? Why extend it to those over whom he could not possibly have the slightest influence? Why not rather adopt the reasoning of the Illinois Courts, which have provided one sensible limitation? viz:

That this rule of non-liability shall not extend to the acts of other employes in other departments of the same service, wherein the idea of influence cannot be imagined, and these are the only grounds given to support the fallacious claim that Public Policy will be subserved.

Now let me ask, what "influence" an inferior employe can have over the average superior. (the Ohio doctrine.) Would he not be informed that his services as "boss" were not desired, that he had better attend to his own affairs ?

Perhaps in the expressive language af a certain military commander, when a subordinate officer proposed to throw down his spade and cease digging malaria and fever, and, with the bayonet to take Yorktown, with his brigade, was answered, "You are entirely too 'suggestive'; when I want you to advance I will inform you."

Are there any scales delicate enough to weigh the "influence" of an inferior over his superior ? Scarcely.

Then why continue this farce of urging such whimsical and unsound excuses for an unwise and unjust ruling. It might be expected in a country which still has the record of its statute of laborers, and its sytem of class legislation, but what but venality could have induced its introduction into a country where the doctrine that labor is honorable is the universal boast and, from whose ranks the highest places are often worthily filled.

It is suggestive that the principle first took root in this 1, McMullan, 385. country in a State where servile labor existed. Its recognition there was not unnatural, but even there was adopted by a divided Court. Thence to a State where manufacturing was largely in the ascendancy ; 4 Metcalf, 49 and, while the toilers were busy at loom and forge, the employer class were attending to weaving and forging Public Policy (?) e. g. A Dakota Statute shows the advance foot-print of the Northern Pacific.

That "Public Policy" which takes no account of the fact that men—perhaps heads of families—without fault on their part, are thrown upon the public charge ; destitute children turned out to beg or to starve, and to multiply the ranks of the criminal and vagrant classes, must be spurious, and had better be abandoned.

And just here let me refer to the fact that in the country of its origin, and where the Court expressed so much anxiety lest it should be frittered away by "minute distinctions," the parliament, in one branch, at least, representing the people of England, finding the Judges unwilling to listen to "minute distinctions" in behalf of the laboring classes, took the matter out of their hands, and at once wiped the whole thing out, as an insult to the intelligence of the age.

In 1880 the parliament of England passed an act, now in force, which does away with this outlawry of its laboring classes. The language of the act is as follows:

" When, after the commencement of this act, Personal " injury is caused to a workman—

" 1st. By reason of any defect in the ways, works, machinery, plant, or stock in trade, connected with or used in " the business of the employer, or,

" 2d. By reason of the negligence of any person in the " service of the employer who has Superintendence intrusted " to him, while in the exercise of such Superintendence, or,

" 3d. By reason of the negligence of any person in the " service of the employer, *to whose orders or direction the* " *workmen at the time of the injury was bound to conform,* " where such injury resulted from his having so conformed, or,

" 4. By reason of the act or omission of any such person " in the service of the employer, done or made in obedience " to the rules or by-laws of the employer, or in obedience to " particular instructions given by any person delegated with " the authority of the employer in that behalf, or,

" 5. By reason of the negligence of any person in the " service of the employer, who has charge or control of any " signal, points, Locomotive Engine or train upon any Rail-

" way, the workman, or in case of his death, the legal repre-
" sentatives of the workman, and any persons entitled, in
" case of death, shall have the same right of compensation
" and remedies against the employer as if the workman had
" not been a workman of, nor in the service of the employer,
" nor engaged in his work."

The above act took effect Jan. 1st, 1881. It seems evident that this act was aimed directly at what I have called Judicial class legislation.

In a country like England, what but the gravest reasons could have brought about such a revolution in public sentiment as that indicated by such a statute? Must not the parliament of that country have become convinced of the existence of the gravest injustice, not only toward the victims of these accidents but by the public at large.

If we look to the numerous decisions of the Courts on this subject, we find them far from supporting the sweeping claim that the unlimited non-liability doctrine has received general adoption in this country.

In a work on the law of negligence, by James H. Deering, of the San Francisco Bar,—a work of considerable merit,—the author says, on page 327, § 204, clause 9:

" The weight of authority seems to be in favor of the
" proposition, that the general rule that a master is not liable
" to a servant for the negligence of a co-servant, does not
" apply where the injured servant is inferior in rank to the
" one by whose negligence he is injured, and is under the
" direction and control of such other, and is bound to obey
" his orders," and cites the following cases, among which are cases from the States of Missouri, California, Connecticut, Illinois, Indiana, Iowa, Kansas, Michigan, New York, North Carolina, Tennessee, Texas, Wisconsin, Ohio, and others.

R'd Co. vs. Ford, 17 Wall., 553; (S. C. 2d Dill. 259.)

The Clatsop Chief, 7 Saw'y, 274.

Miller vs. The M. P. R'y Co., 17 Fed. Rep. 67.

Gilmore vs. N. P. R. R., 18 Fed. Rep. 866.

Gravelle vs. M. & St. L. R'y Co; 3 McCrary, 352.

Beeson vs. Green Mountain Gold Min. Co.; 57 Cal., 20.

Wilson vs. Willimantic S. Co.; 50 Conn., 433; 47 Am. Rep., 650.

Chicago &c. R'd Co. vs. McLellen; 84 Ill., 109.

Toledo &c. R'd Co. vs. Ingraham; 77 Ill., 309.

Chicago &c. R'd Co. vs. May; 108 Ill., 288.

Mitchell vs. Robinson; 80 Ind. 281; 41 Am. Rep. 812.

Gormley vs. Ohio & Miss R'y Co.; 72 Ind. 31.

Hoben vs. Burlington &c. R'd Co.; 20 Iowa, 562.

Kansas Pacific R'y Co. vs. Little; 19 Kan. 267.

Chicago &c. R'y Co. vs. Bayfield; 37 Mich. 205.

Ryan vs. Bogsley; 56 Mich. 179; 45 Am. 35.

Drymala vs. Thompson; 26 Minn. 40.

Dowling vs. Allen; 73 Mo. 13; 41 Am. Rep. 298.

Devany vs. Vulcan Iron Works; 4 Mo. App. 236.

Gromley vs. Vulcan Iron Works; 61 Mo. 492.

Corcoran vs. Holbrook; 59 N. Y. 517.

Bradley vs. N. Y. Central R'd Co.; 62 N. Y. 99.

Egan vs. Tucker; 18 Hun. 347.

McCosker vs. L. I. R'd Co.; 21 Hun. 500; S. C. 59; How. Practice 258.

Warner vs. Erie Rail'y Co.; 49 Barb. 558.

Cowles vs. R. & D. R'd Co.; 84 N. C. 309; 37 Am. Rep. 620.

Dobbin vs. Richmond &c. R'd Co.; 81 N. C. 446.

Little Miami R'd Co. vs. Stevens; 20 Ohio, p. 415.

C. C. C. & I. R'd Co. vs. Keary; 3d O. S., p. 201.

Berea Stone Co. vs. Kraft; 31 O. S. 287.

Haines vs. East Tenn. &c. R'd Co.; 3d Cold., 222.

Texas Mexican R'y Co. vs. Whitmore ; 58 Texas, 276.
Brabbits vs. Chicago &c. R'd Co. ; 38 Wis. 289.
Shultz vs. Chicago &c. R'd Co. ; 48 Wis. 375.

Now, while this Court is not bound to adopt the ruling of the State Courts, yet we think that where the uniform ruling has been so long continued as to become the common law of the State, so to speak, and, under which this Railroad Company sought and obtained its privileges, enjoys the protection of the laws, and of its Courts, and these rules being so consonant with justice and reason, and by which all other Companies abide, with no complaint of its working injustice to them, we think this Court may properly adopt the same for the purposes of this case.

It is gratifying to observe that the tendency of this Court for the past few years has been to sustain certain exceptions to the rule of non-liability of the employer as held by some of the State Courts.

e. g. It has been held by this Court that the employer—Railroad Company, may be liable for injuries resulting from the use of defective machinery, whereby an employee is injured, although such defect arose from the negligence of a so called co-employe.

Hough vs. Texas Pacific R'd Co. ; 10 Otto, p. 213–226.

Also. That a Conductor, having charge of a train of cars, shall not be regarded as a fellow servant with those under him, and that the Company may be held liable for his negligent acts, resulting to those placed under him by the Company.

Railroad Co. vs. Ross ; 112 U. S., 377.

In the U. P. R'd Co. vs. Jesse L. Fort, 17 Wallace, 553, 3d clause syllabus:

" Where a boy was injured while employed in a service " outside the contract, and wholly disconnected with it, by "the direction of a co-employee, under whose directions he "was at the time, the employer is liable."

It would seem that the only ground on which liability could be held to arise in that case, was the fact of the boy being placed by the Company under the orders and direction of the co-employe.

The Court also say:

"Having entrusted to him the care and management of "the machinery, and in so doing made it his rightful duty "to adjust it where misplaced, and, having placed the boy "under him, with directions to obey him, they must pay the "penalty of the tortious act he committed in the course of "his employment."

Every element in the doctrine held in Ohio, is embraced in this holding of this Court, and hence all that is needed to sustain the judgment of the Circuit Court in this case.

Respectfully submitted.

G. R. WALKER,
Att'y for Def't in Error.

For W. Severance and
G. R. Walker, Att'ys.

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Supreme Court of the United States.

THE BALTIMORE & OHIO RAILROAD CO.
Plaintiff in Error,

vs.

WILLIAM SUTHERLAND,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

JOHN H. DOYLE,
Attorney for Defendant in Error.

BARKDULL PRINTING HOUSE, TOLEDO.

IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

THE BALTIMORE & OHIO RAILROAD CO.,

VS.

WILLIAM SUTHERLAND.

ERROR.

BRIEF FOR DEFENDANT IN ERROR,

The main issue in the case is whether Sutherland, the plaintiff below, and Edward Lewis, "the hostler," so-called, were fellow-servants.

The petition charged that he was employed by the railroad company, and by its orders placed under the immediate and personal charge and direction of one Edward Lewis, a locomotive engineer, known as "the hostler," and was injured while strictly obeying the orders of Lewis, and by his negligence in the performance of his duties as hostler.—Page 9, Record.

The answer says it is not true that said Edward Lewis was a superior servant of this defendant to the said plaintiff, but, on the contrary, was a fellow-servant with him, engaged in a common service with him at the time of his said injury, and the injury was the direct result of the carelessness and negligence of plaintiff, and of the carelessness and negligence of said Edward Lewis, etc.—Page 13, Record.

That Lewis was careless and negligent in the performance of his duty at the time of the injury is not only admitted but directly averred in the answer.

The only issues presented by the pleadings for trial were, First. Were Sutherland and Lewis fellow servants? and, Second. Was the injury the result of the combined negligence of both? In other words, was the plaintiff below guilty of such contributory negligence as prevented his recovery?

Both are questions of fact, purely and simply. While Courts will determine from the nature of the employment, service and duties of employes as a question of law, or mixed law and fact, whether the relation of superior and subordinate exists, it is entirely competent for the master and servant to fix that relation by contract, and where a servant is instructed to obey another as his superior, and the contract of employment makes one subordinate to the other, there is no necessity and no room for any interpretation of the relation, as in cases where it arises solely from the character of their respective duties.

The question of contract having been put in issue, the proof clearly establishes it both directly and circumstantially. *Directly*, by Sutherland's testimony, page 23 of Record, practically admitted by Gunther, the master mechanic who hired him, page 114, 115, 116 Record. *Circumstantially*, by the testimony of all the witnesses, practically uncontradicted, that helpers were always subject to the orders of and required to obey the hostler.

Sutherland, page 24.
Brewbaker, page 49, 52.
Moore, page 60.
Burdge, page 64.

All of which is practically admitted by Gunther, who employed all these men, and who was called by the railroad company.—Pages 114, 115, 116.

Independently of contract, the relation between Lewis and Sutherland was not that of fellow-servant, but superior and subordinate. When the engine came into the yard, the conductor and engineer abandoned it, and it was turned over to the hostler, who from the time he received it was the representative of the company—the conductor, so to speak. His directions when to move and where to move were controlling. His orders to his helpers were the orders of the company, and obedience was required. This is not only testified to directly, but was necessary from the very nature of the business. It was a perilous business, not only to the employes, but without proper head and direction to the property of the company. It was very much like the change of conductors. When the engine ceased to be a part of the train, the regular train men left it, and turned it over to a new set. A conductor, the hostler, who directed its movements, and the helpers under him who carried such directions into effect; in co-operation with him it is true, but under his orders and control.

The company would be negligent in failing to have such a relation. Here was a very perilous work. In the night time, with whatever degrees of darkness, with no matter how much storm or rain, these men were required to open a door and let down an apron, which extends into the tender of the engine, so that the coal would be fed into the tender from the bins above. A movement of the engine either way, while he is in the act of either directing the coal or replacing the trapdoor or the apron, is certain to crush him or throw him off on to the track. In the position of this engine any movement of it was certain to crush him between the apron and the cab, the space between which, where he is compelled to stand, being only two feet. He is put in this position by the company, and its duty required that it should also put there some responsible, intelligent, agency, to provide reasonable means for his safety; some one who would have the right and be charged with the duty of holding that engine there and prevent its movement until the work was done, and the man out of danger. It could not put the servant in this position without such provision for his safety, and while we claim it put Lewis there as its representative, the claim that it did not is only an admission of its negligence.

> Northern Pacific Railway Co. vs. Herbert, 116 U. S., 642.

In Lake Shore & Michigan Southern Railway Company vs. Lavalley, 36 Ohio State, 221, it was held:

"2. It is the duty of a railroad company to make such regulations or provisions for the safety of its employes as will afford them reasonable protection against the dangers incident to the performance of their respective duties.

"3. A foreman was put in charge of a set of hands, whose business it was to repair freight cars while standing on the track, in the yard of the company in which trains were accustomed to be made up: it was also the duty of the foreman to participate with the hands in doing the work. While the foreman and a hand were engaged in repairing a car, and the latter was at work under the car, by order of the foreman, he was injured by the striking of the car on which he was at work by another car, moving on the same track. *Held*

1. That the hand was the subordinate of the foreman, in respect to the work in which he was engaged at the time he was injured.

2. That it was the duty of the foreman, in putting the hand to work under the car, to use reasonable care to protect him, while thus engaged, from the danger arising from the switching of cars and the making up of trains on the same track; and for an injury resulting from the want of such care, the company is liable.

The Court, in the opinion read by Judge White, say on pages 226 and 227 of the report:

"The claim on behalf of the company is that Fox was the superior of Lavalley in all matters connected with the order and manner in which the work upon the cars should be conducted; but in the matter of keeping watch and look out for danger, that no relation of superior and subordinate existed; that in this respect they were merely fellow-servants engaged in a common service, neither having any control or authority over the other.

We do not concur in this view. It was the duty of the company to make such provision or regulations for the safety of its employes as would afford them reasonable protection from the dangers incident to the performance of their respective duties.

In the present case Lavalley, the plaintiff below, was one of a set of hands whose business it was to repair freight cars while standing on the track. The place in which the repairing was required to be done was in the freight yard of the company, in which the freight trains were accustomed to be made up, and where there was a constant switching of cars from one track to another. The services, therefore, required of these hands were peculiarly dangerous; and it was the duty of the company to make reasonable regulations or provisions to protect them from the dangers to which they were exposed from moving trains and cars, while engaged in the discharge of their duties.

The hands, under the regulations of the company, were put in the charge of Fox, who, in directing their operations, was the representative of the company. No other provision or regulation seems to have been made for their government or protection. By setting Lavalley to work under the car, where, by the exercise of reasonable care, he could not discover an approaching train or car in time to save himself from injury, it was the duty of Fox to see that reasonable precautions were taken to guard him against such danger; and for the injury resulting from such neglect the company is liable. He might have watched himself, or, if his services were required in the car, he might have requested one of the other hands to watch; but he did neither, nor did he adopt any other precautions."

The relation of Fox in that case and Lewis in this case was exactly the same.

In the Little Miami Railroad Company vs. Stevens, 20 Ohio Reports, 416, it was held:

1. Where an employer placed one person in his employ under the direction of another, also in his employ, such employer is liable for injury to the person of him placed in the subordinate situation, by the negligence of his superior.

2. Where a railroad company places the engineer in their employ under the control of the conductor, who directs when the cars are to start, stop, etc., the company is liable to the engineer for an injury received, occasioned by the negligence of the conductor, whilst they are both engaged in their respective employments.

We take the liberty here of reprinting a part of the opinion of the Court, from pages 431 to 433, more fully than we shall most of the authorities cited.

"The main question arises on the refusal of the court to charge on a single point, and on the charge affirmatively given on the same point; and although this question is presented in different forms by the charges asked, yet we think it is fully presented by the second charge asked and refused, which reads as follows: 'That where two or more persons are employed by one individual, or company, and in doing the work they are employed to do, one of them, by his negligence and inattention to his duties, causes an injury to the other, no action can be sustained against the employer, whether he be an individual or a company.

The proposition here stated, and contended for on the part of the company, is that whilst it is admitted that the company would be liable to the fullest extent for an injury done to a person having no connection with the company, by the negligence of one of their agents, yet that Smith and Stevens, both being in the employ of the company, the company would not be liable for an injury done to Stevens, through the negligence of Smith and the other agents of the company.

It is a general rule that a person in the management of his business, whether he does it himself or acts through agents, must so conduct that business as not to interfere with the rights of or produce injury to others. This devolves on the party care and prudence in the management of his business, and renders him civilly responsible for an injury that may result to others from the want of such care and prudence, whether the injury may be done under his own immediate supervision, or under the control of agents. This doctrine is founded in reason. What can be more reasonable than that he who puts any power in motion for his own benefit, which, from its nature, may be destructive to the property and life of others, if not carefully managed, should be accountable for such injury as may be caused by the careless management of such power. An injury has been done ; it has fallen on a party who is guilty of no wrong, no carelessness ; it has been done by a force put in motion by a party who has caused the injury by his careless management. On whom shall the loss fall ? On the innocent person who had no control or management of the thing that produced it, or shall it rather fall on the person who put the power in motion, for whose benefit it moves, who is in duty bound to provide for its proper management, who selects his agents, controls their movements, and who gives them their authority to act ?

Indeed, the rule is not only a reasonable one, that the employer should make good the injuries thus done by the carelessness of his agents ; but it is necessary as a preventive of mischief, and a protection to community, that it should be strictly adhered to. The rule is founded on the principles of justice between man and man, and, abstractly considered, is of universal application. There must be some good reason for taking any case without its application.

It is said, however, that when a party contracts to perform services, he takss into account the dangers and perils incident to the employment, and receives wages accordingly. Take this for granted ; and we think it falls far short of sustaining the main proposition. If the party does contract in reference to the perils incident to the business, he will only be presumed to contract in reference to such as necessarily attend it when conducted with ordinary care and prudence. So far as an implied contract, in reference to the business, will be presumed, it will be on the hypothesis that the business is to be properly managed. He cannot be presumed to have contracted in reference to injuries inflicted on him by negligence—by wrongful acts. An express stipulation would at least be necessary to make it a part of the contract. The employer has paid him no money for the right to break his legs, or, as in this case, to empty on him the contents of a boiler of scalding water. It was not the expectation, when the company hired Stevens, that the two trains should run by different cards and thus come in collision."

That Sutherland was placed under the charge and control of Lewis is an undoubted fact in the case from the testimony.

That Lewis was in control just as much as a conductor is abundantly shown.

Testimony of Brewbaker, one of defendant's hostlers, page 49 Record :

"The duty of the hostler is to take charge of the engine, to handle the engines and tell his men what he wanted them to do." Page 52.—"The helpers or tenders work under the hostlers orders."

Testimony of Moore, one of defendant's helpers, page 60 :

"Will you tell the jury whose orders the helper is bound to obey in the performance of his duty ?
Ans. The hostler."

Testimony of Albert Burdge, defendant's helper for seven months. Page 64 :

"You may tell the jury now what, if any, instructions were there given by Mr. Gunther, as to whom you were to obey ?
Ans. He said I should obey the hostler. He said he put me there under the hostler's employment, and I should obey him."

Sutherland's testimony, page 23 Record :

"He (Gunther) hires and discharges the employes that work at the round house, and he hired me as tender to tend engines, and Edward Lewis was hostler, and that I should work under him."

While the train was running the conductor was the representative of the company in charge directing its movements ; when the train came into the yard the engines were turned over to another gang, in which the conductor was called a hostler, between that point and the round-house he was equally the representative of the company, directing the movements and controlling the men.

In the Berea Stone Company vs. Kraft, 31 Ohio State, 287, it was held:

"The master is liable for an injury to a servant, resulting from the negligence of a superior servant, while the latter is discharging the duties of one under his control, to the same extent as if the act causing the injury had been committed by an inferior servant under his directions."

The Court in the opinion on page 292, says:

"The ground of the liability of the master for the negligent conduct of his servant, in all cases where the liability arises, is, that the servant's act is the act of the master. The implied obligation of the servant to assume all risks incident to the employment, including that of injury occasioned by the negligence of a fellow servant, has no application where the servant by whose negligent conduct or act the injury is inflicted, sustains the relation of superior in authority to the one receiving the injury. The claim that Stone was a fellow-servant engaged in the same service with Kraft, is not supported by the proof. It is true that he was in the service of the same master, and engaged in the same general employment, but he was intrusted with duties and responsibilities of entirely a different nature, and wholly independent of those of Kraft. Occupying to the latter the relation, substantially, of principal, he was in no just or proper sense a fellow-servant, nor engaged in what may properly be denominated a common service. The relation existing between them was such as brings the case clearly within the rule established by repeated adjudications of this court, and now firmly settled in the jurisdiction of the State, that where one servant is placed by his employer in a position of subordination to, and subject to the orders and contaol of another, and such inferior servant, without fault, and while in the discharge of his duties, is injured by the negligence of the superior servant, the master is liable for such injury.

Little Miami R. R. Co. vs. Stevens, 20 O., 415.

C., C. & C. R. R. Co. vs. Keary, 3 Ohio State, 201.

Mad River and Lake Erie R. R. Co. vs. Barber, 5 O. S., 541.

Whalen vs. Mad River and Lake Erie R. R. Co., 8 O. S., 249.

The Pittsburgh, Fort Wayne and Chicago Railway Co. vs. Devinney, 17 Ohio State, 197.

The fact, if it be true, that Stone's negligence in assisting in fastening the hooks to the stone to be raised, may have caused the injury, and that he was then performing the duty of a common workman, and not those strictly pertaining to the duties of foreman, in nowise relieves the company from liability. If the act done by him had been done under his direction as he did it, by one of the employes of the company, its liability could not be doubted, and for the reason that the negligent act, although committed by the hand of another, was, in law, the act of the foreman, and consequently the act of the master, and it could be no less the act of the master when performed by the foreman in person."

In Pittsburgh, Fort Wayne & Chicago Railroad Co. vs. Lewis, 33 Ohio State, 196, it was held :

"2. Where a master places one servant in a posiiion of subordination to another servant, and the subordinate servant, without fault, is injured through the negligence of the superior servant, while both are acting in the common service, the master is liable therefor.

"3. Whether or not one servant is placed by a common master under the control of another servant, thereby creating the relation of superior and subordinate between them, must be determined from the evidence in each particular case."

In the case at bar that fact was found from the evidence, by the jury, to be established. It was determined that the evidence established that relation, and determined under a charge of the Court that was, to say the least, as strong for the defendant as any rule of law permitted. See pages 127 and 128 Record.

The relation of subordinate and superior having been found there was little left for the jury to do, except to ascertain whether the plaintiff was guilty of contributory negligence, for the answer itself admitted and alleged the negligence of Lewis.

Independently, however, of the answer, the proof of Lewis' negligence is abundant and will not be disputed.

We have selected these few cases from Ohio, which are in accord with a uniform line of decisions on the subject :

C., C. & C. R'way Co. vs. Keary, 3 Ohio St., 201.
Mad River & L. Erie vs. Barber, 5 Ohio St., 541.
Whalen vs. Mad River, etc., 8 Ohio St., 249.
Railroad Co. vs. Spangler, 44 Ohio St., 471.
Steel Railway Co. vs. Bolton, 43 Ohio St., 224.
Dick vs. Railroad, 38 Ohio St., 389.

Under the rule in Ohio, as established by these cases, the relation of superior and subordinate could as well be established from the relation of the parties, the nature of the employment, the custom of the company, or the necessities of the case in view of the duty of the master to the servant as by contract. The Court, therefore, gave the jury too narrow a field in confining it to the contract, but as the contract was abundantly proved we do not complain, and the plaintiff in error certainly cannot.

The rule in Ohio being as stated, and well and clearly established for a period of forty years, it is not an unfair inference, and indeed is a legal inference, that parties contracting in this State contract with reference to it, and the Federal Court will enforce the law of the State as applicable to such contracts.

It is a source of gratification that the rules of the chancery practice of the Federal Court and its administration of equity, is uniform throughout the whole United States. But it is ever to be regretted that in the administration of the law in actions at law, in the State, the Federal Court should adopt any rule that would produce this result, *i. e.*, that a foreign railroad company should be permitted to operate a railroad in a State, and because of its citizenship be exempted from the operation of well established rules of law to which all companies organized in the State are subjected.

The plaintiff in error, in this case, controls and operates the longest and most extensive line of railway in Ohio, to some extent, at least, by the grace of the State! It employs the same kind of men, for the same service, and with the same perils as all railroad companies organized under our own law. The law of the State fixing the rights, duties and liabilities of master and servant in such cases is as clearly and definitely settled and fixed as if it had been declared by statute for forty years. These contracts for services are made in the State, as this one was. The contract should be governed by the law of the place and the fixed rules of law incorporated into it as a part of it, as firmly in this as in any other instance, and as firmly where established by uniform decision of the courts, making it the common law of the State, as if by statute, as in

Railroad Co. vs. Herbert, 116 United States, 642.
Missouri Pacific R. R. Co. vs. Mackey, 127 U. S., 225.
C. & N. W. R. R. Co. vs. McLaughlin, 119 U. S., 566.

There is, as yet, no conflict between our State Courts and the Federal Courts on the subject of who are fellow-servants. In Randall vs. Baltimore & Ohio Railroad Company, 109 U. S., 478, it was stated by the Court; Mr. Justice Gray delivering the opinion, that "this Court has not hitherto had occasion to decide who are fellow servants within the rule."

In that case the brakeman working a switch for his train, was held to be a fellow-servant with an engineman of another train, because, as stated in the opinion, "neither works under the orders or control of the other," and because persons standing in the relation of those in that case "are fellow-servants according to the very great preponderance of judicial authority in this country," etc. And in Ohio as well as elsewhere.

On the other hand, in Cunard Steamship Company vs. Carey, 119 U. S., 245, one of the exceptions was the action of the Court in leaving to the jury the queston of whether or not Gerraghty was a fellow-workman with the plaintiff, or the representative of the defendant for whose negligence the defendant would have been liable. The Court affirmed the judgment, by a divided Court it is true, but the facts in that case were so much weaker than in the one at bar, that its affirmance necessarily leads to the same result here.

Whether it was the action of the Court in submitting such question, on the undisputed and *uncontradicted* testimony, to the jury, instead of deciding it as matter of law, that led a part of the Court to disapprove, or the question of liability in any event, the report does not inform us.

Nor does the report inform us whether it was that action of the Court, or the further charge: "That the injury occurred by the untwisting and drawing apart of the portion that was spliced; that the important duty of the hour was to see that the rope did not untwist; and that if the rope was in good condition when it went upon the fall, and thereafter became in bad condition, which Gerraghty knew, and should have attended to himself and did not, and the accident happened in consequence, the defendant was liable," that led to the division of the Court on the question of affirmance; but I submit that in no possible light can that case present any aspect as strong as the one at bar.

In Hough vs. The Texas Pacific Railway Co., 100 U. S., 213, this Court reached a conclusion entirely in harmony with the Ohio rule, so far as it went or was necessary to go in that case.

"4. Those, at least, in the organization of a railroad corporation, who are invested with a controlling or superior duty in that regard, represent its personality: their negligence from which the injury results is the negligence of the corporation."

In Railroad Co. vs. Fort, 17 Wallace, 553, the Court say :

"But this presumption cannot arise where the risk is not within the contract of service, and the servant would have no reason to believe he would have to encounter it. If it were otherwise, principals would be released from all obligations to make reparations to an employe in a subordinate position, for any injury caused by the wrongful conduct of the persons placed over him, whether they were fellow-servants in the same common service or not. Such a doctrine would be subversive of all just ideas of the obligations arising out of the contract of service, and withdraw all protection from the subordinate employes of railroad corporations."

The Northern Pacific Railway Co. vs. Herbert, 116 U. S., 642, is an advance in the same direction.

There has been much contrariety of opinion in the different States as to who are fellow-servants. Whether that qusstion is to be determined by the fact that one is superior in authority with the right to direct and control the other. Whether they are in the same department of service, or whether their relation makes one the direct representative of the employer and the like.

See also 127 U. S., 205 ; 119 U. S., 566.

Since the remark of Mr. Justice Gray, in Randall vs. Baltimore, etc., R. R., above quoted, this Court has spoken on the subject in favor of the rule now contended for by us.

There can be no difference, under the testimony in this case, between the position of Lewis and a conductor in charge of a railway train.

The case of Chicago, Milwaukee & St. Paul Railway Company vs. Duane O. Ross, 112 U. S., 377, it seems to us is decisive of the right of this defendant in error to have his judgment affirmed. That a conductor of a train was not the fellow-servant of the engineer, the brakeman, the porters and other subordinates employed, was there distinctly held.

The very careful opinion in that case by Mr. Justice Field, contains extracts from Railroad Company vs. Stevens, 20 Ohio, page 415, and Railway Company vs. Keary, 3 Ohio State, 201, cited above, which contain the strongest argument in favor of the rule established by those cases.

While the dissenting judges thought that the long established rule with regard to the exemption from responsibility of employers for injuries to their servants by the negligence of fellow-servants, required them to contend that the conductor was a fellow-servant of the other employes of the train, we submit that the tendency of the modern decisions and the rule adopted by the legislatures are now largely the other way.

But it is quite strongly impressed on our minds that to reverse the judgment in the case at bar will require the overruling of the authority of the Ross case.

We can hardly see any distinction between a conductor managing a train, and a conductor managing simply an engine. The number of cars under his control does not make any difference. It is the *control* which makes him the representative of the company, coupled with the necessity of the business that some person should be in control.

The question presented here is this :

By contract the company employes a man, and by the terms of the contract he is to work under the immediate orders and control, not of the employer in person, but of another designated by the employer for that purpose, a conductor.

If the employer in this case were a natural person, and he personally was present and moved the engine which hurt Sutherland, no one would doubt his liability. But he designates another person to act in his place and stead, exercising the control of the servant that he himself would if present. The servant takes the ordinary risks incident to the employment, but not the risk of negligence of his master or the representative of the master.

This representative, who has power to command, says to the employe, who must obey : "Go up and open that coal chute," and at night, in the dark, while the servant is in the act of obeying, this representative of the company, who commanded in its name, knowing that the servant was in the act of obeying, negligently started the engine which he alone controlled, and cut off the servant's leg. Is the company liable for such negligence, and to the servant under these circumstances?

When this contract of service was made at Chicago Junction, in Ohio, it was, and had been for forty years, the common law, as interpreted by the Ohio Courts, that a master was liable to his servant for the negligence of a superior. That one in authority over the other, one occupying a superior position, was not the "fellow servant" of the inferior; that he was the representative, the *alter ego* of the master, and the negligence of such superior servant is the negligence of the master.

Now, if this had been declared by statute, this Court, as has already been shown, would enforce the statute. But it would, none the more, be the law of the State, if enacted in a statute, than it is, or was, by uniform decision, for nearly half a century.

I understand that the Court has held that it is not *bound* by the decisions of the State Courts, upon the principles of the common law, or except on the interpretation of statutes, local usage or custom having the force of law, principles which have become settled rules of property. Nor would I claim, under the decisions of this Court, any force to the rule thus established in Ohio, if it had not reached that age and uniformity of approval, as to become the common law of the State, if I may use that term, not to be overthrown or reversed without the most cogent reasons.

But in addition to this the master is liable for the negligence of a superior servant, resulting in the injury of the inferior, is the rule in a great many of the States of the Union, either by statute, in many cases making the liability much broader, or by the decision of the Courts.

In England, under the Employers' Liability Act, 1880, the Ohio rule is adopted, and is now the law; 43 and 44 Vict., c. 42. Any workman may now recover in England when the injury is occasioned, first

(1.) "By reason of any defect in the machinery used.

(2.) By reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him.

(3.) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury results from his having so conformed.

(4.) By reason of the act or omission of any persons in the service of the employer, in obedience to the rules of the employer, or in obedience to particular instructions given by any persons delegated with the authority of the employer in that behalf.

(5.) By reason ef the negligence of any person in the service of the employer who has the charge or control of any signal points, locomotive engine, or train upon a railway."

In case death occurs, the administrators of the workman have a similar right of action.

Many cases have already been decided, all holding that any authorized control makes the person exercising it a superior.

Cox vs. Great Western L. R., 10 Q. B. Div., 106.
Turitt vs. Midland R'way Co., 72 L. T., 87.

See Vol. 11 Am. and Eng. Railway cases, pages 272-3, for a collection of cases and decisions under this statute.

It is the rule, practically, in

Rhode Island: R. S., 1882, p. 553, sec. 15.
Georgia: Code, 1873, sec. 3036, p. 52c; 63 Georgia, 173.
Iowa: see 119 U. S., 566, *ante.*
Kansas: Rev. Laws, 1879, ch. 84, sec. 4914, p. 784.
Kentucky: R. R. Co. vs. Collins, 2 Duv., 114.

Mississippi: Rev. Code, 1880, sec. 1054, p. 300.
Montana: Rev. Statutes, 1879, sec. 318.
Wisconsin: Rev. Statutes, 1878, p. 530.
Ohio: see cases already cited.
N. Carolina: Cowles vs. Richmond, 2 Am. & Eng. R'way Cases, 90.
Missouri: Cook vs. Hannibal & St. Joe R. R. Co., 63 Mo. 397.
Hall vs. Mo. Pacific R'way Co., 74 Mo., 298, and cases cited.
Whalen vs. Centenneray Church, 62 Mo., 326.
Michigan: Chicago R. R. vs. Bayfield, 37 M., 205.
Tennessee: Louisville, etc., R. R. vs. Bowles, 9 Heisk, 866.
Nashville R. R. vs. Jones, Id. 27.
New York: Flike vs. B. & A. R. R., 53 N. Y., 549.
(In effect), Buchner vs. N. Y. C. R. R., 2 Lansing, 506; affirmed, 49 N. Y., 672; 59 N. Y., 517; 64 N. Y., 5, 12.
Wisconsin: Revised Statutes, 1878, sec. 1816; 47 Wis., 138; 48 Wis., 375; 50 Wis., 419.

We have not pursued the matter through the statutes or decisions of the various States, but have given enough to show that it is no longer true that there is any current of authority against the view expressed by the Court below in its charge.

The exception taken by plaintiff in error to the action of the court in reference to the empannelling of the jury, found on page 21 of the printed record, cannot be sustained.

A jury was empannelled and sworn, and without further action the Court adjourned for the day. On the next morning the marshall reported to the Court the sickness of one of the jurors, and the Court being satisfied, as shown upon its journal, that the juror could not be present, counsel were asked if they would proceed with the remaining elven. The plaintiff below consented, the railroad company declining. The inquiry was then made by the Court whether the panel should be filled by calling another of the jurors present.

The plaintiff below again assented, and the railroad company (plaintiff in error) declined. The jury was then discharged.

To tho discharge of the jury from further consideration the defendant below excepted, and thereupon a jury was again called to try the cause, and the defendant excepted.

There was no objection or exception made or taken to any of the names called, or to any other matter or thing in relation to the empannelling of the jury, and the only question presented therefore is whether the Court was justified in discharging the jury and empannelling another jury for the trial of the case.

There is, of course, no claim that the jury was not impartial and thoroughly competent to try the case. No claim that any wrong was actually done to the plaintiff in error. The sole queetion is whether the Court abused its discretion in the matter.

In Thompson on Trials, Vol. I. Secs. 88, *et seq.*, the question is discussed and the rule announced, that it was competent for the Court to discharge the jury on account of illness of one of them, and that even in a criminal case the eleven remaining may be put upon the prisoner again, subject only to his right to challenge anew-

See Sec. 90 and cases cited.

But, we repeat, the only objection was to discharging the jury and empannelling a new one. None to the persons constituting the new jury ; and, under the rule announced in Northern Pacific Railway Co. vs. Herbert, 116 U. S., 642, the plaintiff in error cannot complain.

JOHN H. DOYLE,
for Defendant in Error.

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SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1889.

No. 38

The Baltimore & Ohio Railroad Co.,
Plaintiff in Error,
VS.
William Sutherland,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Brief in Reply for Defendant in Error.

JOHN H. DOYLE.

Toledo Bee Company, Printers.

Supreme Court of the United States.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Plaintiff in Error.
VS.
WILLIAM SUTHERLAND,
Defendant in Error.

Reply to the Brief of the Plaintiff in Error.

The errors assigned are: that the Court erred in refusing the instructions prayed for by the "defendants?" (plaintiff?) in error; and in the charge as given, inasmuch as it incorrectly stated the law of Master and Servant, left to the jury questions which should be decided by the Court, stated facts not in evidence and misled the jury as to the effect of the evidence.

In the argument of Counsel, it is assumed that the extract from the testimony of Sutherland is all the evidence bearing on the question of a specific arrangement that Sutherland should work under and be subject to the direction and orders of Lewis as his superior.

But Counsel overlook the very important fact that Gunther, whose duty it was to employ all these men and place them in their respective departments, does not deny the contract as it is alleged.

"When you hired Sutherland what, if any, instructions did you give him as to his obeying, in his work, Lewis, the hostler?

A. I couldn't say that I gave him any instructions. I don't recollect that I did anything of the kind. I may have told the man that the hostler would tell him what he had to do, or something of that kind, but I couldn't say that I did or not. I make it my business if I employ a man——

The Court:

Q. He asked you what you did in this particular instance.

A. I cannot recollect in this particular instance."—Record, page 114.

"Mr. Newbegin:

Q. Did you use the word 'obey' Lewis, when you employed him, to go to work there as helper?

A. I would be unable to say whether I did or not."—Record, page 115.

In addition to this, there is the proof that it was the custom in the yard for the hostler to direct the helpers under him; that the helper who was employed to succeed Sutherland the morning he was hurt was told that Lewis was his superior, to whom he must look and whom he was to obey.—Page 64.

That Gunther told Brewbaker, another hostler, that if any of his helpers refused to obey him he would put men there who would; another statement which Gunther refuses to deny.—Page 116, etc.

And more than all this, the testimony as to the character of the business to be done, which absolutely requires, not for the safety of life alone, but for the safety of the company's property and the possibility of transacting its business, that the hostler, when the engine came into his charge, should have the same control and management as the conductor in charge of the train.

When this train came into the yard, one set of train men left it and another took charge of it While it was in charge of the regular conductor, he managed and controlled its movements. He did not move the engine— the engineer did that but he controlled its movement; he directed when to go and where to go. The very nature of the business required that there should be some such controlling mind

When he reached the yard at Chicago Junction, which was simply the end of his run, and left his train standing on the track, it could no more move itself without some controlling mind than before There was still the movement of this powerful and dangerous machinery to be directed Some one, of necessity, had the power and discretion to say where this engine should go and when it should go, to get its water, coal, sand, and when it should be stabled in its proper stall in the engine house.

Counsel would argue, and the case below was tried on that theory, that there were three men on or about this engine at one time, each having the same right and the same power to direct its movements and control its destination.

In the trial of the case the defense undertook to make some proof of that kind, especially by the witness Bramley, whose testimony on that point is so absolutely absurd and so completely contradicted as to be unworthy of consideration, and who was examined in part on that question by the Court. See pages 95 and 96.

The hostler, Lewis, refuses to make so broad a statement as that, but says, on page 100, in answer to a question on another matter:

> "As far as that is concerned, it is a railroad, and we need to get the engine in with taking advantage of the engine. I am supposed to look after the engine, to see that it is all right and taken into the house—take charge of her that she doesn't lose her water and burn herself, or anything of that kind, and I was taking advantage of her to get her in. I am supposed to look after the engine."

Counsel, in discussing this feature of the case, say, on page 14 of their brief, that "The very act of negligence on which this suit is based consisted in the movement of the locomotive without waiting for the order from Sutherland."

Not at all. The negligence consisted in putting Sutherland, in the performance of his duty, in this position, where alone he could perform his duty, and where a movement of the engine would necessarily crush him, and moving the engine without waiting for him to finish his duty and get free from the danger. Sutherland gave no orders and had none to give It was in testimony that when the helper had finished his work and was out of danger, it was usual for him, in the night time, when the conductor or hostler could not see him, to indicate his safety by words, such as "all right," or the like, but these were not orders. Lewis testified that he heard some one say "all right," but does not say it was Sutherland See top of page 106.

But he is so overwhelmingly contradicted on this point that the jury found against him.

I do not appreciate the refinement of reasoning that would draw a distinction between the representative of the company in the person of a conductor, managing a train with two or more cars, whose character as a vice-principal grows out of the two facts: First, That the nature of the business requires a controlling mind in the moving of the train, and, Second, That he is the person designated to exercise that control; and another person, who happens to be called a "hostler," whose character as a vice-principal grows out of precisely the same facts, and who is invested with the same kind of control, even though there be but one car or one engine to be moved and controlled by him.

There was, therefore, sufficient evidence, both as to the contract of employment and the nature of the business in which the parties were engaged, to submit the question to the jury whether the parties were fellow servants or occupied the position of superior and servant, or vice-principal and servant. Not that the question as one of law was submitted to them, but as there was a conflict in the testimony on these points, the question of the preponderance of evidence should be passed upon by them under the rules of law given.

This being so, it would be gross error in the Court to have given the instructions asked for by defendants below, which would be equivalent to saying that although the proof offered by the plaintiff on these points was true, nevertheless the plaintiff could not recover.

The Court, in its charge, took the view that if the proof established that Sutherland was employed and directed to obey the directions and be under the orders of the hostler, and Lewis had the right to send and direct him, and had control over him and was his superior, having control and direction of his actions in the performance of this particular work, and that Lewis was in control of this particular department of the railroad service, then they were not fellow servants, but the relation of superior and subordinate existed.

The Court could not as matter of law determine whether these facts existed, but submitted them to the jury. It determined and instructed the jury that if they did exist, then the hostler occupied such a relation that the company might be liable for his negligence.

There is no complaint about the Court's charge on the doctrine of contributory negligence, and the negligence of Lewis, causing the injury, and in the performance of the work he was in direction of, is admitted.

I think Counsel misapprehend the effect and scope of the discision of this Court in R. R. Co. vs. Ross, 112 U. S. The controlling idea in that case, as expressed in the opinion, is that the conductor is the representative of the company, because "he commands the movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it and control over the persons employed upon it," "If such a conductor," says the Court, "does not represent the company, then the train is operated without any representative of its owner."

This Court did not undertake to say that this conductor should have charge of any certain number of cars, or that his run should be any certain number of miles, nor did it place any importance on the fact that he was called a conductor. It was the control and management that was important.

The Court below, in the charge to the jury, (see bottom of page 128 and top of 129) submitted the question, under the evidence, as to whether Lewis exercised this same kind of control and management. There was proof that he did, and the jury found that he did.

The only difference that I can see between the Ross case and this is, that in the Ross case the Court directed the jury that the conductor and engineer were not fellow servants; but if the injury was the result of the negligence of the conductor, the company was liable. There was probably no dispute in that case as to the conductor's duties. The Court, in this case, charged the jury that if, under the evidence, they found that relation to exist, which was the basis of the holding in the Ross case, then the company is liable, if the injury was the result of Lewis's negligence, and Sutherland was free of negligence, &c.

The Court will, I assume, look to the charge of the Court as a whole, and not to particular sentences printed in a brief, which, standing alone, might be, as the Court intimates the charge in the Ross case was, subject to verbal criticism, and will apply the same rule in this case that it did in the Ross case.

> "As this charge was, in our judgment, correct, the plaintiff was entitled to recover upon the conceded negligence of the conductor. The charge on other points is immaterial; whether correct or erroneous, it could not have changed the result, the verdict of the jury could not have been otherwise than for the plaintiff. Without declaring, therefore, whether any error was committed on other points, it is sufficient to say that we will not reverse the judgment below if an error was committed on the trial which could not have affected the verdict."

So here, the negligence of Lewis being conceded, the only question necessary to submit to the jury was whether his relation and position was such that he had the control and direction of the movement of the engine and the men under him and subject to his orders in such movement.

This charge of the Court submits to the jury, under proper instructions, every question at issue, and is correct under both the Ohio cases and the Ross case and subsequent cases in this Court.

There is no conflict in the Ohio decisions. Railway vs. Lewis, 33 O. S. 196, and Railway vs Ranney, 37 O. S. 665, assert the rule as we claim it, as strongly as any of the cases cited in our brief.

In Ohio the syllabus of a case is the decision of the Court. It is prepared and must be agreed to by the Court, and by rule of the Supreme Court contains the point or points decided by the Court.

That counsel misconceive the scope and effect of these decisions is made apparent by the following propositions of the syllabi in the Lewis case:

"1. A master, whether an individual or a corporation, is responsible to his servants for his own negligence; but, as a general rule, not for that of their fellow servants."

"2. Where, however, a master places one servant in a position of subordination to another servant, and the subordinate servant, without fault, is injured through the negligence of the superior servant, while both are acting in the common service, the master is liable therefor."

"3. Whether or not one servant is placed by a common master under the control of another servant, thereby creating the relation of superior and subordinate between them, must be determined from the evidence in each particular case."

"4. Where an engineer and brakeman were employed by a Railroad Company in operating the same train, *and there was no evidence to prove* that the brakeman was placed in a position of subordination to the engineer, other than what may be implied from the rules of the company requiring the engineer to give certified specified signals as a notice to apply or loose the brakes and requiring the brakeman to manage the brakes 'according to circumstances and the signals of the engineman,' and placing the brakeman while on the train in *subordination to the conductor*, held," &c., that they were fellow servants.

In the Ranney case the doctrine of the Lewis case was approved, the facts being substantially the same.

I quote from the language of Judge McIlvaine a single sentence in support of the uniformity of decisions of the Ohio Courts:

> "This doctrine, which imputes to the master the negligence of a servant to whom he has delegated authority over other servants, has been firmly ingrafted in the jurisprudence of this State ever since the case of Little Miami R. R. Co. vs. Stephens, 20 Ohio 416. See also C., C. & C. R. R. Co. vs. Keary, 3 Ohio State 201, and L. S. & M. S. R. R. Co. vs. Laralley, 36 O. S. 221, and cases therein cited."

Without undertaking to quote from it here, I am quite content with the rule laid down in the Lewis and Ranney cases.

In this case Lewis was the conductor who absolutely controlled the movement of the engines, directed when and where to move and go, how fast to go and when to stop. He had two helpers under him in this work. No other living man could, in its performance, direct, control or interfere with him or this work. It was a department necessarily controlled, directed and operated by his mind alone.

So the jury found, and having so found, a verdict for the plaintiff was necessary.

JOHN H. DOYLE.